

No. 11237

United States
Circuit Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

THE ATCHISON, TOPEKA & SANTA FE
RAILWAY COMPANY,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Northern Division

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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District Court of the United States for the Northern
District of California, Northern Division

Civil No. 4906

THE UNITED STATES OF AMERICA,
Plaintiff,

v.

THE ATCHISON, TOPEKA & SANTA FE
RAILWAY COMPANY,

Defendant.

COMPLAINT

1. The United States of America, by Frank J. Hennessy, United States Attorney for the Northern District of California, brings this action under the Acts of Congress known as the Safety Appliance Acts (U. S. Code, title 45, sections 1 to 16, inclusive), against The Atchison, Topeka & Santa Fe Railway Company, a corporation organized and doing business under the laws of the State of Kansas, and having an office and place of business at Stockton, California, this action being brought upon suggestion of the Attorney General of the United States, at the request of the Interstate Commerce Commission, and upon information furnished by said Commission. [1*]

2. For a First Cause of Action plaintiff alleges that defendant during all the times mentioned herein was a common carrier engaged in interstate commerce by railroad in the State of California.

*Page numbering appearing at foot of page of original certified
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3. That in violation of the provisions of the U. S. Code, title 45, sections 1 to 10, inclusive, defendant on April 4, 1944, hauled on its line of railroad, over a part of a highway of interstate commerce, one car, to wit: Wabash box car No. 46354.

4. That on said date defendant hauled said car in and about Stockton, California, within the jurisdiction of this court, when the coupling and uncoupling apparatus on the "B" end thereof was out of repair and inoperative, the uncoupling lever being disconnected from lock block of coupler on said end of said car, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by sections 2 and 8 of title 45 of the said U. S. Code.

5. Defendant is therefore liable to plaintiff in the sum of one hundred dollars. [2]

6. For a Second Cause of Action plaintiff alleges that defendant during all the times mentioned herein was a common carrier engaged in interstate commerce by railroad in the State of California.

7. That in violation of the provisions of the U. S. Code, title 45, sections 1 to 10, inclusive, defendant on April 6, 1944, hauled on its line of railroad, over a part of a highway of interstate commerce, one car, to wit: Central of Georgia flat car No. 11138.

8. That on said date defendant hauled said car in and about Stockton, California, within the jurisdiction of this court, when the coupling and uncoupling apparatus on the "A" end thereof was out of repair and inoperative, the uncoupling lever on said end of said car being fouled by the lading, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by sections 2 and 8 of title 45 of the said U. S. Code.

9. Defendant is therefore liable to plaintiff in the sum of one hundred dollars. [3]

10. For a Third Cause of Action plaintiff alleges that defendant during all the times mentioned herein was a common carrier engaged in interstate commerce by railroad in the State of California.

11. That in violation of the provisions of the U. S. Code, title 45, sections 1 to 10, inclusive, defendant on April 7, 1944, hauled on its line of railroad, over a part of a highway of interstate commerce, one car, to wit: A. C. L. box car No. 18088.

12. That on said date defendant hauled said car in and about Stockton, California, within the jurisdiction of this court, when the coupling and uncoupling apparatus on the "A" end thereof was out of repair and inoperative, the lock block of coupler on said end of said car being inoperable, thus necessitating a man or men going between the ends of the

cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by sections 2 and 8 of title 45 of the said U. S. Code.

13. Defendant is therefore liable to plaintiff in the sum of one hundred dollars. [4]

14. For a Fourth Cause of Action plaintiff alleges that defendant during all the times mentioned herein was a common carrier engaged in interstate commerce by railroad in the State of California.

15. That in violation of the provisions of the U. S. Code, title 45, sections 11 to 16, inclusive, and an order of the Interstate Commerce Commission of March 13, 1911, prescribing standards of equipment, made pursuant thereto, defendant on April 7, 1944, hauled or used on its line of railroad, over a part of a highway of interstate commerce, one car, to wit: P. RR box car No. 503205.

16. That on said date defendant hauled or used said car over its line of railroad in and about Stockton, California, within the jurisdiction of this Court, when the handhold on the right hand side of the "B" end of said car was bent in against car, and when said car was not equipped with end-handholds, one near each side of each end of car, with a minimum clearance of two inches, in accordance with the standards prescribed by said order of March 13, 1911.

IV.

Defendant denies the allegations contained in Paragraph V first cause of action of the complaint.

V.

Defendant admits allegations contained in Paragraph VI second cause of action of the complaint.

VI.

With respect to Paragraphs VII and VIII second cause of action of the complaint, defendant admits that Central of Georgia flat car No. 11138 was defective in the particulars alleged in said paragraphs; denies that defendant hauled said car on its line of railroad over a part of a highway of interstate commerce within the meaning of U. S. Code Title 45, Sections 1 to 10 on the 6th day of April, 1944 or at any time when in said condition and in this connection alleges that on the 6th day of April, 1944 at the hour of 8:50 a.m. the Central of Georgia flat car No. 11138 described in the complaint was placed on the interchange track between the yards of the Western Pacific Railroad Company and the defendant company by the Western Pacific Railroad Company connected to and in the middle of a string or train of cars; that at said time and place said car was discovered by defendant to be defective in the particulars described in the complaint and its receipt in interchange was refused; that in order to disconnect said car from the remaining cars in said string or train which were not defective, it was necessary to move said string or train of cars from the interchange track to the

switching yards at the defendant company, there to disconnect the same and redeliver it to the said interchange track; that on said date the said string or train of cars including the flat car herein described was moved to the switching yard of defendant company, disconnected from the other cars which were not defective and at the hour of 5:15 p.m. on April 6, 1944, the car described was redelivered to the interchange track between said carrier facilities; that the handling of the car described was purely incidental to disconnecting it from the remaining cars in the string or train in which it was connected or delivered by the Western Pacific Company. [9]

VII.

Denies allegations of Paragraph IX second cause of action of the complaint.

VIII.

Admits the allegations of Paragraph X third cause of action of the complaint.

IX.

With respect to Paragraph XI and XII third cause of action of the complaint, defendant admits that on April 7, 1944, A.C.L. Box Car No. 18088 was defective in the particular alleged in the complaint; denies that defendant hauled said car on its line of railroad over a part of a highway of interstate commerce within the meaning of U. S. Code Title 45, Section 1 to 10 inclusive on the 7th day of April, 1944, or at any time when said car was in such defective condition; alleges that the said car was

placed on the interchange track between the facilities of the Western Pacific Railroad and the defendant's railroad at the hour of 9:25 a.m. April 7, 1944 for interchange to defendant's line of railroad and connected with and in the middle of a string or train of cars which were not defective with the exception of the car mentioned in the 4th cause of action herein; that said car was at that time and place inspected by defendant company, its defective condition discovered and interchange refused; that it was necessary, in order to disconnect said car from the string or train of cars in which it was included, to move said string or train of cars from interchange track to the switching yards of defendant company; that on said day the said string or train of cars including the train described was moved to the switching yards of said defendant company, the car described disconnected from the remaining cars and said car redelivered to the interchange track between the Western Pacific Company and the defendant company, said redelivery taking place [10] at the hour of 7:00 p.m. on April 7, 1944; that the movement of said car was purely incidental to and necessary in disconnecting it from the other cars received from the connecting carrier.

X.

Denies the allegations contained in Paragraph XIII third cause of action of the complaint.

XI.

Admits the allegations contained in Paragraph XIV fourth cause of action of the complaint.

XII.

With respect to Paragraphs XV and XVI fourth cause of action of the complaint, defendant admits that "P" RR box car No. 50325 was defective in the particulars therein alleged; denies that defendant hauled or used said car on its line of railroad over a part of a highway of interstate commerce within the meaning of U. S. Code, Title 45 Sections 11 to 16 inclusive on the 7th day of April, 1944 or at any other time while in such defective condition; alleges that the said car was included within the string or train of cars placed on the interchange track between the Western Pacific Railroad Company and the defendant company on the 7th day of April, 1944 described in Paragraph IX of this answer; that the said car likewise was in the middle of the said string or train of cars; that the defective condition of said car was discovered by defendant company at the hour of 9:25 a.m. April 7, 1944 and was refused in interchange because of said defective condition; that in order to disconnect said car from the remaining cars in said train which were not defective, it was necessary to move said string or train of cars to the switching yards of defendant company and there disconnect the defective cars contained in said train; that on said day said string or said train of cars [11] was moved to the switching yards of defendant company and the car herein described was disconnected therefrom and redelivered to the interchange track at the hour of 7:00 p.m. on the 7th day of April, 1944; that the movement of said car was purely incidental to and neces-

sary in disconnecting it from the other cars of said string or train of cars.

XIII.

Denies allegations of Paragraph XVII fourth cause of action of complaint.

Wherefore, defendant prays judgment that plaintiff take nothing by his complaint and that defendant have judgment for its costs herein.

J. C. GIBSON

C. L. EWING

(Affidavit of Service by Mail Attached.)

[Endorsed]: Filed May 29, 1944. [12]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on the 7th day of November, 1944, before the Court, sitting without a jury, Thomas O'Hara, Esquire, Assistant United States Attorney, and James O. Tolbert, Esquire, Attorney for the Interstate Commerce Commission, appearing on behalf of plaintiff, and Charles L. Ewing, Esquire, appearing for the defendant, and evidence both oral and documentary having been introduced and the cause submitted for decision, the Court now makes its findings of fact, as follows:

FINDINGS OF FACT

FIRST CAUSE OF ACTION

I.

That defendant during all of the times mentioned in the Complaint was a common carrier engaged in interstate commerce by railroad in the State of California.

II.

That on or about the 4th day of April, 1944, Wabash box car No. 46354 was placed on the interchange track connecting the Southern Pacific Company's railway system with the defendant's railway system in the City of Stockton, California; that said car was placed on said interchange track by the Southern Pacific Company for delivery to the defendant; that when so placed on said interchange [14] track by the Southern Pacific Company, the said car was defective in that the coupling and uncoupling apparatus on the "B" end thereof was out of repair and inoperative, the uncoupling lever being disconnected from the lock block of the coupler on said end of said car.

III.

That when said car was placed on said interchange track by the Southern Pacific Company, the said car was coupled in a string or train of cars and between other cars which were not defective, and which nondefective cars were likewise placed on the interchange track for the purpose of delivery to the defendant company; that the manner in which the said defective car was coupled with the nondefective

cars was such that the nondefective cars could not be moved or used without the movement of the said Wabash box car No. 46354.

IV.

That, at said time and place, defendant inspected all of said cars including Wabash box car No. 46354, discovered the defective condition of the said car, posted on said car a notice indicating that the car was defective, and refused to accept said car in its defective condition.

V.

That Wabash boxcar No. 46354 was equipped with a type "E" coupler, top operated. The top operated toggle had the bottom "U" connection spread which allowed it to separate from the lock block. To repair this condition, it was necessary to remove the knuckle and the lock block and apply complete new uncoupling mechanism.

VI.

That the said Wabash boxcar No. 46354 was disconnected from the remaining nondefective cars by the defendant [15] and placed back on the interchange track for return to the Southern Pacific Company by defendant after being so disconnected; that the movement performed by the defendant in disconnecting said car from the nondefective cars was accomplished by pulling the entire train or string of cars from said interchange track to the defendant's yards approximately eight-tenths (8/10ths) of a mile distant, there disconnecting the said Wabash boxcar No. 46354 and shoving said de-

fective car back to the interchange track for return to the Southern Pacific Company.

VII.

That the movement of said car by defendant was the movement incidental to and necessary in disconnecting it from the remaining nondefective cars and returning it to the Southern Pacific Company.

VIII.

That said movement included only the minimum number of switching operations necessary to disconnect the said car from the remaining nondefective cars and to return it to the Southern Pacific Company.

IX.

That the movement of said car was the most practical method of disconnecting said car from the non-defective cars and returning it to the Southern Pacific Company which could have been adopted under operating conditions prevailing at said place on said date.

X.

That on the 4th and 5th days of April, 1944, at the time when the said Wabash boxcar No. 46354 was refused in interchange by defendant, the interchange track between the Southern Pacific Company and the defendant, as well as the main line track of defendant and the various other tracks in the vicinity of the said interchange track, were [16] congested with a heavy movement of war traffic over the lines of both carriers.

XI.

That an indefinite period of time would have been required to have repaired the defective Wabash boxcar No. 46354 on the interchange track; that while said repairs were being made all traffic on said track would have been interrupted; that such interruption would have seriously impeded traffic of both defendant and the Southern Pacific Company.

XII.

That the method adopted by defendant in disconnecting the said Wabash boxcar No. 46354 from the nondefective cars with which it was delivered and returning it to the Southern Pacific Company subjected its employees to no greater hazard than any other method of disconnecting said car and returning it would have subjected them; that any other method of disconnection of said car from the non-defective cars and its return would have created additional hazards to employees operating trains on the main line of defendant company and to the general public using railroad crossings in the vicinity of the said interchange track.

XIII.

That it was neither feasible nor practical to repair the defective Wabash boxcar No. 46354 on the interchange track.

SECOND CAUSE OF ACTION

I.

That defendant, during all of the times mentioned in the Complaint, was a common carrier engaged

in interstate commerce by railroad in the State of California. [17]

II.

That on or about the 6th day of April, 1944, Central of Georgia flatcar No. 11138 was placed on the interchange track connecting the Western Pacific Railroad Company's railway system with defendant's railway system in the City of Stockton, California; that said car was placed on said interchange track by the Western Pacific Railroad Company for delivery to defendant; that, when so placed on said interchange track by the Western Pacific Railroad Company, the said car was defective in that the coupling and uncoupling apparatus on the "A" end thereof was out of repair and inoperative; the uncoupling lever on said end of said car being fouled by the lading.

III.

That when said car was placed on said interchange track by the Western Pacific Railroad Company, the said car was coupled in a string or train of cars and between other cars which were not defective, and which nondefective cars were likewise placed on the interchange track for the purpose of delivery to the defendant company; that the manner in which the said defective car was coupled with the nondefective cars was such that the nondefective cars could not be moved or used without the movement of said Central of Georgia flatcar No. 11138.

IV.

That at said time and place defendant inspected

all of said cars including Central of Georgia flatcar No. 11138, discovered the defective condition of said car, posted on said car a notice indicating that the car was defective, and refused to accept said car in its defective condition. [18]

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V.

That Central of Georgia flatcar No. 11138 was in the defective condition herein referred to because the load thereon had shifted so as to prevent the operation of the uncoupling lever on said car. To repair or correct this condition, it was necessary to shift the entire load on said car to clear the uncoupling lever.

VI.

That Central of Georgia flatcar No. 11138 was disconnected from the remaining nondefective cars by the defendant and placed back on the interchange track for return to the Western Pacific Railroad Company by defendant after being so disconnected; that the movement performed by the defendant in disconnecting said car from the non-defective cars was accomplished by pulling the entire train or string of cars from said interchange track to the defendant's yards approximately seven-tenths (7/10ths) of a mile distant, there disconnecting the said Central of Georgia flatcar No. 11138 and shoving said defective car back to the interchange track for return to the Western Pacific Railroad Company.

VII.

That the movement of said car by defendant was

the movement incidental to and necessary in disconnecting it from the remaining nondefective cars and returning it to the Western Pacific Railroad Company.

VIII.

That said movement included only the minimum number of switching operations necessary to disconnect the said car from the remaining nondefective cars and to return it to the Western Pacific Railroad Company. [19]

IX.

That the movement of said car was the most practical method of disconnecting the said car from the nondefective cars and returning it to the Western Pacific Railroad Company which could have been adopted under operating conditions prevailing at said place on said date.

X.

That on the 6th day of April, 1944, at the time when the said Central of Georgia flatcar No. 11138 was refused in interchange by defendant, the interchange track between the Western Pacific Railroad Company and the defendant, as well as the main line track of defendant and the various other tracks in the vicinity of said interchange track, were congested with a heavy movement of war traffic over the lines of both carriers.

XI.

That an indefinite period of time would have been required to have repaired the defective Central of

Georgia flatcar No. 11138 on the interchange track; that while said repairs or corrections were being made all traffic on said track would have been interrupted; that such interruption would have seriously impeded traffic of both defendant and the Western Pacific Railroad Company.

XII.

That the method adopted by defendant in disconnecting said Central of Georgia flatcar No. 11138 from the nondefective cars with which it was delivered and returning it to the Southern Pacific Company subjected its employees to no greater hazard than any other method of disconnecting said car and returning it would have subjected them; that any other method of disconnection of said car from the nondefective cars and its return would have created additional [20] hazards to employees operating trains on the main line of defendant company and to the general public using railroad crossings in the vicinity of the said interchange track.

XIII.

That it was neither feasible nor practical to repair the defective Central of Georgia flatcar No. 11138 on the interchange track.

THIRD CAUSE OF ACTION

I.

That defendant, during all of the times mentioned in the Complaint, was a common carrier engaged in interstate commerce by railroad in the State of California.

II.

That on or about the hour of 9:25 a.m., April 7, 1944, ACL boxcar No. 18088 was placed on the interchange track connecting the Western Pacific Railroad Company's railway system with the defendant's railway system in the City of Stockton, California; that said car was placed on said interchange track by the Western Pacific Railroad Company for delivery to defendant; that when so placed on said interchange track by the Western Pacific Railroad Company, the said car was defective in that the coupling and uncoupling apparatus on the "A" end thereof was out of repair and inoperative, the lock block of the coupler of the said end of said car being inoperative.

III.

That when said car was placed on said interchange track by the Western Pacific Railroad Company, the said car was coupled in a string or train of cars and between other cars which were not defective and which nondefective cars were likewise placed on the interchange track for the purpose of delivering to the defendant company; that the manner [21] in which the said defective car was coupled with the nondefective cars was such that the nondefective cars could not be moved or used without the movement of the said ACL boxcar No. 18088.

IV.

That at said time and place defendant inspected all of said cars, including ACL boxcar No. 18088,

discovered the defective condition of said car, posted on said car a notice indicating that the car was defective, and refused to accept said car in its defective condition.

V.

The ACL boxcar No. 18088 was a "D" top operated coupler with a No. 2 lock lift which had worn until the anti-creak feature stuck in the knuckle lock, thereby making it inoperative. In order to repair this condition, it was necessary to remove the knuckle, free it, put back lock lifter and apply a link at the top of the lock lifter to prevent it from dropping down and fouling in the knuckle lock.

VI.

That the said ACL boxcar No. 18088 was disconnected from the remaining nondefective cars by the defendant and placed back on the interchange track for return to the Western Pacific Railroad Company by defendant after being so disconnected; that the movement performed by the defendant in disconnecting said car from the non-defective cars was accomplished by pulling the entire train or string of cars from said interchange track to the defendant's yards approximately seven-tenths (7/10ths) of a mile distant, there disconnecting the ACL boxcar No. 18088 and shoving said defective car back to the interchange track for return to the Western Pacific Railroad Company.

VII.

That the movement of said car by defendant was the movement incidental to and necessary in dis-

connecting it from the remaining nondefective cars and returning it to the Western Pacific Railroad Company.

VIII.

That said movement included only the minimum number of switching operations necessary to disconnect the said car from the remaining nondefective cars and its return to the Western Pacific Railroad Company.

IX.

That the movement of said ACL boxcar No. 18088 was the most practical method of disconnecting said car from the nondefective cars and returning it to the Western Pacific Railroad Company which could have been adopted under operating conditions prevailing at said place on said date.

X.

That on the 7th day of April, 1944, at the time when the said ACL boxcar No. 18088 was refused in interchange by defendant, the interchange track between the Western Pacific Railroad Company and the defendant, as well as the main line track of defendant and the various other tracks in the vicinity of said interchange track, were congested with a heavy movement of war traffic over the lines of both carriers.

XI.

That an indefinite period of time would have been required to have repaired the defective ACL boxcar No. 18088 on the interchange track; that while said repairs were being made all traffic on said track

would have been interrupted; that such interruption would have seriously [23] impeded traffic of both defendant and the Western Pacific Railroad Company.

XII.

That the method adopted by defendant in disconnecting said ACL boxcar No. 18088 from the nondefective cars with which it was delivered and returning it to the Western Pacific Railroad Company subjected its employees to no greater hazard than any other method of disconnecting said car and returning it would have subjected them; that any other method of disconnection of said car from the nondefective cars and its return would have created additional hazards to employees operating trains on the main line of defendant company and to the general public using railroad crossings in the vicinity of said interchange track.

XIII.

That it was neither feasible nor practical to repair the defective ACL boxcar No. 18088 on said interchange track.

FOURTH CAUSE OF ACTION

I.

That defendant, all of the times mentioned in the Complaint, was a common carrier engaged in interstate commerce by railroad in the State of California.

II.

That on or about the 7th day of April, 1944, PRR

boxcar No. 503205 was placed on the interchange track connecting the Western Pacific Railroad Company's system with the defendant's railway system in the City of Stockton, California; that said car was placed on said interchange track by the Western Pacific for delivery to defendant and when so placed on said interchange track by the Western Pacific, the said car was defective in that the handhold on [24] the righthand side of the "B" end of said car was bent in against said car.

III.

That when said car was placed on said interchange track by the Western Pacific Railroad Company the said car was coupled in a string or train of cars and between other cars which were not defective, and which nondefective cars were likewise placed on the interchange track for the purpose of delivery to the defendant company; that the manner in which the said defective car was coupled with the nondefective cars was such that the nondefective cars could not be moved or used without the movement of the said PRR boxcar No. 503205.

IV.

That at said time and place defendant inspected all of said cars including PRR boxcar No. 503205, discovered the defective condition of the said car, posted on said car a notice indicating that the car was defective, and refused to accept said car in its defective condition.

V.

That PRR boxcar No. 503205 was in a defective

condition due to the fact that the handhold on the "B" end of the right side had been bent. In order to repair this appliance, it was necessary to straighten the handhold by the use of a bar.

VI.

That the said PRR boxcar No. 503205 was disconnected from the remaining nondefective cars by the defendant and placed back on the interchange track for return to the Western Pacific Railroad Company by defendant after being so disconnected; that the movement performed by the defendant in disconnecting said car from the nondefective [25] cars was accomplished by pulling the entire train or string of cars from said interchange track to the defendant's yards approximately seven-tenths (7/10ths) of a mile distant; there disconnecting the said PRR boxcar No. 503205 and shoving said defective car back to the interchange track for return to the Western Pacific Railroad Company.

VII.

That the movement of said car by defendant was the movement incidental to and necessary in disconnecting it from the remaining nondefective cars and returning it to the Western Pacific Railroad Company.

VIII.

That said movement included only the minimum number of switching operations necessary to disconnect the said car from the remaining nondefective cars and to return it to the Western Pacific Railroad Company.

IX.

That the movement of said car was the most practical method of disconnecting said car from the nondefective cars which could have been adopted under operating conditions prevailing at said place or said time.

X.

That on the 7th day of April, 1944, at the time when the said PRR boxcar No. 503205 was refused in interchange by defendant, the interchange track between the Western Pacific Railroad Company and the defendant as well as the main line track of defendant and the various other tracks in the vicinity of the said interchange track were congested with a heavy movement of war traffic over the lines of both carriers.

XI.

That an indefinite period of time would have been [26] required to have repaired the defective PRR boxcar No. 503205 on the interchange track; that while said repairs were being made all traffic on said track would have been interrupted; that such interruption would have seriously impeded traffic of both defendant and the Western Pacific Railroad Company.

XII.

That the method adopted by defendant in disconnecting the said PRR boxcar No. 503205 from the nondefective cars with which it was delivered and returning it to the Western Pacific subjected its employees to no greater hazard than any other

method of disconnecting said car and returning it would have subjected them; that any other method of disconnection of said car from the nondefective cars and its return would have created additional hazards to employees operating trains on the main line of defendant company and to the general public using railroad crossings in the vicinity of said interchange track.

XIII.

That it was neither feasible nor practical to repair the defective PRR boxcar No. 503205 on the interchange track.

GENERAL FINDING

The Court finds as a fact all facts which are hereinafter stated as conclusions of law.

CONCLUSIONS OF LAW

From the foregoing findings of fact, the Court makes the following conclusions of law:

FIRST CAUSE OF ACTION

I.

That the movement of Wabash boxcar No. 46354 by defendant after its refusal in interchange for the purpose [27] of and incidental to disconnecting it from nondefective cars and returning it to the delivering carrier, as found by the Court to be a fact, does not constitute a violation of the provisions of United States Code, Title 45, Sections 1 to 16, inclusive.

II.

That the method used by defendant in disconnecting said car from the other cars and returning it to the delivering carriers, as heretofore found by the Court to be the most practical under operating conditions prevailing and further found to be no more hazardous than any other method, was properly selected by defendant and was within its discretion to select over other possible methods.

III.

That defendant had no duty to repair said Wabash boxcar No. 46354, that duty resting with the delivering carrier, the Southern Pacific Company.

IV.

That defendant had no duty to repair said Wabash boxcar No. 46354 on the interchange track before making the movements which it did make in disconnecting it and returning it to the Southern Pacific Company.

V.

That defendant has not violated the provisions of United States Code, Title 45, Sections 1 to 16, inclusive, in connection with Wabash boxcar No. 46354 at the time mentioned in the Complaint, or at all.

VI.

That on the first cause of action defendant is entitled to judgment against plaintiff without costs.

SECOND CAUSE OF ACTION

I.

That the movement of Central of Georgia flatcar No. 11138 by defendant after its refusal in interchange for the purpose of and incidental to disconnecting it from nondefective cars and returning it to the delivering carrier, as found by the Court to be a fact, does not constitute a violation of the provisions of United States Code, Title 45, Sections 1 to 16, inclusive.

II.

That the method used by defendant in disconnecting said car from the other cars and returning it to the delivering carrier, as heretofore found by the Court to be the most practical under operating conditions prevailing and further found to be no more hazardous than any other method, was properly selected by defendant and was within its discretion to select over other possible methods.

III.

That defendant had no duty to repair said Central of Georgia flatcar No. 11138, that duty resting with the delivering carrier, the Western Pacific Railroad Company.

IV.

That defendant had no duty to repair said Central of Georgia flatcar No. 11138 on the interchange track before making the movements which it did make in disconnecting it and returning it to the Western Pacific Railroad Company.

V.

That defendant has not violated the provisions of United States Code, Title 45, Sections 1 to 16, inclusive, in connection with Central of Georgia flatcar No. 11138 at the time mentioned in the Complaint, or at all. [29]

VI.

That on the second cause of action defendant is entitled to judgment against plaintiff without costs.

THIRD CAUSE OF ACTION

I.

That the movement of ACL boxcar No. 18088 by defendant after its refusal in interchange for the purpose of and incidental to disconnecting it from nondefective cars and returning it to the delivering carrier, as found by the Court to be a fact, does not constitute a violation of the provisions of United States Code, Title 45, Sections 1 to 16, inclusive.

II.

That the method used by defendant in disconnecting said car from the other cars and returning it to the delivering carrier, as heretofore found by the Court to be the most practical under operating conditions prevailing and further found to be no more hazardous than any other method, was properly selected by defendant and was within its discretion to select over other possible methods.

III.

That defendant had no duty to repair said ACL

No. 18088, that duty resting with the delivering carrier, the Western Pacific Railroad Company.

IV.

That defendant had no duty to repair said ACL boxcar No. 18088 on the interchange track before making the movements which it did make in disconnecting it and returning it to the Western Pacific Railroad Company.

V.

That defendant has not violated the provisions of United States Code, Title 45, Sections 1 to 16, inclusive, [30] in connection with ACL boxcar No. 18088 at the time mentioned in the Complaint, or at all.

VI.

That on the third cause of action defendant is entitled to judgment against plaintiff without costs.

FOURTH CAUSE OF ACTION

I.

That the movement of PRR boxcar No. 503205 by defendant after its refusal in interchange for the purpose of and incidental to disconnecting it from nondefective cars and returning it to the delivering carrier, as found by the court to be a fact, does not constitute a violation of the provisions of United States Code, Title 45, Sections 1 to 16, inclusive.

II.

That the method used by defendant in disconnecting said car from the other cars and returning it

to the delivering carrier, as heretofore found by the Court to be the most practical under operating conditions prevailing and further found to be no more hazardous than any other method, was properly selected by defendant and was within its discretion to select over other possible methods.

III.

That defendant had no duty to repair such PRR boxcar No. 503205, that duty resting with the delivering carrier, the Western Pacific Railroad Company.

IV.

That defendant had no duty to repair said PRR boxcar No. 503205 on the interchange track before making the movements which it did make in disconnecting it and returning it to the Western Pacific Railroad Company. [31]

V.

That defendant has not violated the provisions of United States Code, Title 45, Sections 1 to 16, inclusive, in connection with PRR boxcar No. 503205 at the time mentioned in the Complaint, or at all.

VI.

That on the fourth cause of action defendant is entitled to judgment against plaintiff without costs.

Dated: This 6th day of August, 1945.

MARTIN I. WELSH
District Judge

[Endorsed]: Filed Aug. 6, 1945. [32]

District Court of the United States for District
of California, Northern Division

Civil No. 4906

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE ATCHISON, TOPEKA & SANTA FE
RAILWAY COMPANY,

Defendant.

JUDGMENT

This cause having come on to be heard on the 7th day of November, 1945, and evidence having been presented by both parties, and the case having been submitted to the Court and the Court having entered herein its written Findings of Fact and Conclusions of Law,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff take nothing by its Complaint or by any cause of action therein contained; that the action and each cause of action therein contained be dismissed on the merits, without costs.

Dated: August 6, 1945.

MARTIN I. WELSH

District Judge.

[Endorsed]: Filed Aug. 6, 1945. [33]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Now comes the Plaintiff, United States of America, appearing by Frank J. Hennessy, United States Attorney for the Northern District of California, and hereby appeals from the Judgment rendered on August 6, 1945 in favor of the Defendant in the above entitled case, to the Circuit Court of Appeals for the Ninth Circuit.

Dated: November 2, 1945.

FRANK J. HENNESSY

United States Attorney

By EMMET J. SEAWELL

Assistant U. S. Attorney

HARLAN M. THOMPSON

Assistant U. S. Attorney

[Endorsed]: Filed Nov. 2, 1945. [34]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD

TO BE CONTAINED IN RECORD ON APPEAL

Appellant designates the following portions of the record to be contained in the record on appeals in the above entitled action:

1. Complaint
2. Answer

3. Transcript of the evidence
4. Finding of Facts
5. Conclusions of Law
6. Judgment
7. Notice of Appeal
8. This designation
9. Designation by appellee of additional matters
to be included in the record.

Dated: November 12, 1945.

UNITED STATES OF

AMERICA

By THERON L. CAUDLE

Assistant Attorney General

FRANK J. HENNESSY

United States Attorney

By EMMET J. SEAWELL

Assistant United States

Attorney

[Endorsed]: Filed Jan. 8, 1946. Nunc pro tunc
as of Nov. 12, 1945. [35]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Monday the 7th day of January, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Martin I. Welsh,
District Judge.

[Title of Cause.]

On motion of Emmet J. Seawell, Assistant U. S. Attorney, it is Ordered that the time to docket the record on appeal be extended 30 days from and after December 12, 1945, nunc pro tunc, that is, as of November 12, 1945. It is further Ordered that this order be entered nunc pro tunc, that is, as of December 12, 1945. [36]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Thursday the 10th day of January, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Martin I. Welsh,
District Judge.

[Title of Cause.]

On motion of Emmet J. Seawell, Esq., Assistant U. S. Attorney, it is Ordered that the appellant herein be and it is hereby allowed to and includ-

ing the 1st day of February, 1946, within which to file and docket its record on appeal in the Circuit Court of Appeals. [37]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 37 pages, numbered from 1 to 37, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of United States of America vs. The Atchison, Topeka and Santa Fe Railway Company, No. 4906, as the same now remain on file and of record in this office; said record having been prepared pursuant to and in accordance with the Designation of Portions of Record to be contained in Record on Appeal, copy of which is embodied herein.

In witness whereof, I have hereunto set my hand and the official seal of said District Court, this 21st day of January, A.D. 1946.

C. W. CALBREATH,

Clerk

By F. M. LAMPERT

Deputy Clerk. [38]

In the District of the United States in and for
the Northern District of California, Northern
Division.

No. 4906

Before Honorable Martin I. Welsh, Judge.

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.

THE ATCHISON, TOPEKA & SANTA FE
RAILWAY COMPANY,
Defendant.

REPORTER'S TRANSCRIPT

Tuesday, November 7, 1944

Appearances: For the Government: Thomas O'Hara, Esq., Assistant United States Attorney; James O. Tolbert, Esq., Attorney for the Interstate Commerce Commission. For the Defendant: C. L. Ewing, Esq.

Tuesday, November 7, 1944, 10:00 o'clock A. M.

The Clerk: United States vs. Atchison, Topeka & Santa Fe.

Mr. O'Hara: That is ready. At this time, may it please the Court, I move the Court to permit the association for the Government in the trial of this case of Mr. James O. Tolbert, a member of the bar of the District of Columbia, who is attorney for the Interstate Commerce Commission.

The Court: So ordered.

Mr. Tolbert: If your Honor please, this is a civil action arising under what is known as the Federal Safe Appliance Act contained in Title 45 of U. S. Code, Sections 1 to 16.

The case contains four causes of action, and the Government alleges that on April 4th and April 6th and April 7th, 1944 the defendant railroad hauled four cars with defective safe appliances in and about Stockton, California when they had defective appliances on them. Three of these cars had the couplers so defective that they could not be operated without the man going in between the ends of the cars for that purpose, and in the fourth cause of action there was a defective handle on the end of the car, in that it was bent in against the car and was of no value as a handle on account of lack of clearance.

Section 2 of Title 45 of the Code provides that all cars must be equipped with couplers coupling automatically by impact [2*] and which may be uncoupled without men having to go in between the ends of the cars.

Section 4 of this same title of the Code requires that all cars be equipped with secure handles on the ends and sides of the car to afford greater security to the men coupling and uncoupling the cars, and one of these handles is the one that is bent.

Together with Mr. Ewing and Mr. O'Hara, we have an agreed statement of facts here that were drawn up, as I understand, by Mr. Ewing, and when we got together we found that there were

*Page numbering appearing at top of page of original Reporter's Transcript.

some things that we could not agree on, and the stipulation is rather marked up, but we still think that it is plain. Would you care to have the stipulation read now, or do you just want the substance of it?

The Court: Whatever you wish.

Mr. Tolbert: Well, I might just as well read it right now.

“The United States of America vs. The Atchison, Topeka and Santa Fe Railway Company, No. 4906.

“Agreed statement of facts.

“It is hereby agreed and stipulated, by and between the undersigned attorneys for plaintiff and the undersigned attorneys for defendant, that the following statement of facts are agreed and stipulated to be true and correct and may be considered by the Court as though offered in evidence [3] herein by either party hereto, save and except that the competency, relevancy, or materiality of any fact set forth in the following statement is not agreed to and either party may object to the consideration of any portion of said statement of facts by the Court upon the ground that any such fact is incompetent, irrelevant, or immaterial. Upon such objection, however, if the Court should determine any such fact to be relevant, competent, and material, despite such objection, then the Court may consider such fact with the same force and effect as though the same had been offered in evidence, objection taken and objection overruled.

"The facts so stipulated to are as follows, to wit:

I.

"That attached hereto and made a part of this statement of facts is a map with a legend thereon entitled 'Part of Stockton, California'. That said map is drawn to a scale of one inch as the equivalent of one hundred feet and that said may accurately and in accordance with said scale depicts the layouts of the interchange track between the Southern Pacific Railroad and The Atchison, Topeka and Santa Fe Railway Company, hereinafter called Santa Fe, and the interchange track between the Western Pacific Railway and Santa Fe, and the Mormon yards of Santa Fe, all at Stockton, California, in the condition in which said tracks were laid out as they existed on the 7th day of April, 1944, and for at least [4] thirty days prior thereto.

II.

"That, at about the hour of 10:25 o'clock A.M. on April 4, 1944, Wabash boxcar 46354 was placed on the interchange track between the Southern Pacific Company's system and the Santa Fe's system in the City of Stockton, California, as shown on said map and said car was placed thereon by the Southern Pacific Company. That at said time and place the said car was defective in that the coupling and uncoupling apparatus on the (b) end thereof was out of repair and inoperative, the uncoupling lever being disconnected from lock block of coupler on said end of said car, thus necessitating a man or men going between the ends of the cars to couple

or uncouple them, and when said car was not equipped with couplers coupling automatically by impact and which could be uncoupled without the necessity of a man or men going between the ends of the cars. That, when so placed on said interchange track by the Southern Pacific Company, said car was coupled between other cars which were not defective, which were also placed on said interchange track by the Southern Pacific Company in such fashion that the other non-defective cars on said interchange track could not be moved or used without the movement of the said Wabash boxcar 46354. That at said time and place, the Santa Fe inspected said cars, discovered the defective condition of the car heretofore [5] described, and refused to accept said car in that condition. That said car was disconnected upon its removal to the Santa Fe yards with the other cars and was at the hour of 3:00 o'clock A.M., April 5, 1944, redelivered to the Southern Pacific Company by placing the same on the interchange track. That the distance from the Southern Pacific and Santa Fe interchange track to the Santa Fe yard is approximately eight-tenths of a mile.

"That Wabash car 46354 was equipped with a type "E" coupler, top-operated. The top-operated toggle had the bottom "U" connection spread which allowed it to separate from the lock block. To repair this condition, it was necessary to remove the knuckle and the lock block and apply complete new uncoupling mechanism."

That takes care of the first cause of action.

“Paragraph III.

“That, on the 6th day of April, 1944, at the hour of 8:50 o'clock A.M., Central of Georgia flatcar No. 11138 was placed on the interchange track between the Western Pacific Railway system and the Santa Fe system, as shown on the map attached hereto, by the Western Pacific and connected to and in the middle of a string or train of cars. That, at said time and place, Santa Fe discovered the coupling and uncoupling apparatus on the ‘A’ and of said car was out of repair and not operative. The uncoupling lever on said end of said car being [6] fouled by the lading, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact and which could be uncoupled without the necessity of a man or men going between the ends of the cars. Upon discovery of this condition, the receipt of this car in interchange from the Western Pacific was refused. That on said date the said string or train of cars, including the car herein described, was moved to the Santa Fe switching yard, the defective car disconnected from the other cars which were not defective, and at the hour of 5:15 o'clock P.M., on April 6, 1944, the car described was redelivered to said interchange track. That the distance from the said Western Pacific interchange to the switch yards of the Santa Fe is approximately seven-tenths of a mile.

“That said Central of Georgia 11138 car was in the defective condition herein related because the

load thereon had shifted so as to prevent the operation of the uncoupling lever on said car. In order to repair or correct this condition, it was necessary to shift the entire load on said car to clear the uncoupling lever.

IV.

"That about the hour of 9:25 o'clock A.M., April 7, 1944, A.C.L. boxcar No. 18088 was placed on the interchange track between the Western Pacific Railroad and the Santa Fe [7] system in the City of Stockton, California, as shown on the map attached hereto, by the Western Pacific Railroad. That, at said time and place, said car was defective in that the coupling and uncoupling apparatus on the "A" end thereof was out of repair and inoperative, the lock block of coupler on said end of said car being inoperable thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers, coupling automatically by impact and which could be uncoupled without the necessity of a man or men going between the ends of the cars. That when so placed on said interchange track by the Western Pacific Railroad, said car was coupled between other cars which were not defective and which were also placed on said interchange track by the Western Pacific Railroad in such fashion that the other non-defective cars on said interchange track could not be moved or used without the movement of said defective car. That at said time and place Santa Fe inspected said cars, discovered the defective condition of the car here-

in mentioned, and refused to accept said car in interchange. That on said date the said string or train of cars, including the car herein described, was moved to the Santa Fe yard, the defective car disconnected from the other cars which were not defective, and at the hour of 7:00 o'clock P.M., on April 7, 1944, the defective car here described was delivered to said interchange [8] track. That the distance from the Western Pacific interchange track to the switch yards of the Santa Fe is approximately seven-tenths of a mile.

"That the A.C.L. Boxcar No. 18088 was a "D" top-operated coupler with a No. 2 lock lift which had worn until the anti-creep feature stuck in the knuckle lock thereby making it inoperative. In order to repair the same, it was necessary to remove the knuckle, free it, put back lock lifter, and apply a link at the top of the lock lifter to prevent it from dropping down and fouling in the knuckle lock.

V.

"That, on the 7th day of April, 1944, at about the hour of 9:25 o'clock A.M., P.R.R. boxcar No. 503205 was placed on the interchange track between the Western Pacific Railroad Company and the Santa Fe, as shown on the map attached hereto, by the Western Pacific and connected to and on the end of the string or train of cars. That, at said time and place, Santa Fe discovered that the hand-hold on the righthand side of the "B" end of said car was bent in against the car and that said car was therefore not equipped with end-hand-holds,

one near each side of each end of car with a minimum clearance of two inches. Upon discoverey of this condition, the receipt of this car in interchange from the Western Pacific was refused. That on said date the said string or train of cars including the car herein described, [9] was moved to the Santa Fe yard, the defective car disconnected from the other cars which were not defective and, at the hour of 7:00 o'clock P.M., on the 7th day of April, 1944, the car described was redelivered to said interchange track. That the distance from the said Western Pacific interchange to the yards of the Santa Fe is approximately seven-tenths of a mile.

"That the said P.R.R. box car No. 503205 was in the defective condition, herein related, due to the fact that the hand-hold on the "B" end of the right side had been bent. In order to repair this appliance, it was necessary to straighten the hand-hold by the use of a bar. It was possible to perform this repair on the interchange track."

This is signed by the respective attorneys, and that, your Honor, we feel makes out a *prima facie* case for the Government, that the cars were admittedly defective, that they were received by this defendant in that condition, and that they were hauled to its own yard in violation of law, and that they were hauled back. And incidentally, this suit provides a penalty of \$100 for each and every violation.

I think that is the Government's *prima facie* case.

The Clerk: Does the Government rest at this time?

Mr. Tolbert: Yes.

The Clerk: May I have the stipulation?

Mr. Tolbert: Yes, I will file it. [10]

Mr. Ewing: May it please the Court, I think probably counsel is correct that at this stage of the proceedings there is nothing more than the Government could say. As a matter of fact, it is entirely possible that at this stage of the proceedings that there is nothing more than the Santa Fe can say, since the pertinent facts are pretty largely before the Court on this agreed statement. Particularly in view of the fact that it does show these track layouts on the map. But so that your Honor will know what we are driving at here in the beginning, we admit and, as was said last Saturday by President Roosevelt, we not only admit, but we assert that these cars were in a defective condition at the time these cars in the defective condition were put on the interchange track by the other railroad, and it is agreed that we refused to accept these cars in the interchange.

We moved these cars with the other cars to which they were connected down to our switching yards, the distances having been stated in the agreed statement, disconnected those cars which we refused and put them back on the interchange.

Now, it won't be any surprise, of course, to counsel, we have been in a way trying this case this morning in going over this agreed statement, we are relying on two cases. I will give your Honor a

little quotation from each. One of them is Baltimore & Ohio Railroad vs. United States and the other, a Ninth Circuit case, United States vs. Northern Pacific Railroad [11] Company in which our Ninth Circuit approves the holding in the Baltimore & Ohio case, and that holding is simply this: That a carrier who finds a car on interchange track offered to them in interchange that is in defective condition by virtue of the Safety Appliance Act is required, of course, to refuse to accept that car in interchange, refuse to take it on its own system, not to repair it or do anything else to it, but to refuse that car in interchange. And it has been stipulated here that we refused those cars in interchange.

Then this Court says in these cases that despite the fact that you refuse that car in interchange, you still are entitled to do such incidental handling of that car as may be necessary to disconnect it from the other cars with which it is connected and to reach the other cars which are not defective and which are on the interchange track.

We have here stipulated also that in each instance there were other cars which were not defective and which were coupled with this car on the interchange track, and our position is that the only handling which took place of these cars was that which as a practical proposition was incidental to disconnecting that car from the other cars on the track so that we could use the cars that were not defective and not thereby block this interchange track for an indefinite period of time while we

call on the other railroad to go in there and switch them out. Instead of that we took the entire cut of cars to our yard, disconnected [12] the defective ones from the non-defective ones and shoved the bad ones back on the track.

If there is anything in addition to this statement to present to sustain our position, it would be little expert testimony to explain the incidental handling of these defective cars, and, incidentally, as your Honor knows, I got in here late this morning, and if your Honor will permit I would like a little more time to consult with the expert witnesses before proceeding further, if it appears that is necessary in order to sustain the handling of these cars incidentally.

In other words we contend that the charge laid in this case is of a highly technical nature, and we have introduced two authorities sustaining the handling of them for that purpose, and since the part of the agreed statement in which I had asserted this handling was incidental is not now in the stipulation I would like to ask your Honor's indulgence to talk to my witnesses for a few minutes for the sole purpose of showing that this handling was simply incidental to the getting of the non-defective cars and using them in the track layout.

The Court: What time do you want?

Mr. Ewing: It is 11:20 now. I am sure we can finish this afternoon if your Honor would grant me until we take up after lunch.

The Court: That will be satisfactory. We will recess until 2:00 o'clock this afternoon. [13]

Mr. Ewing: I might hand your Honor these two quotations I referred to, and I will hand a copy to counsel (producing documents).

(Thereupon an adjournment was taken until 2:00 o'clock p.m. this date.) [14]

Tuesday, November 7, 1944, 2:00 o'clock P.M.

Afternoon Session

The Clerk: United States vs. Atchison, Topeka & Santa Fe.

Mr. Ewing: Your Honor, at this time we would like to call Mr. R. J. Kingston to the stand.

R. J. KINGSTON,

called for the defendant, sworn.

Direct Examination

Mr. Ewing: Q. Mr. Kingston, what is your occupation?

A. Chief Joint Inspector for the Santa Fe at Stockton.

Q. At Stockton, California?

A. Stockton, California.

Q. And how long have you been employed in that capacity? A. For 15 years.

Q. And have you always been in that capacity since you have worked with the Santa Fe?

A. No, sir. I had five years previous in the car shops.

(Testimony of R. J. Kingston.)

Q. In the car shops. Now, during this 15 years that you have been head car inspector, has your experience been in the vicinity of Stockton?

A. It has been on the Stockton interchange transfer.

Q. Will you just tell the Court briefly the nature of your [15] duties in this connection?

A. Well, my duties were to inspect cars passing from one railroad to another and carding them or setting them back, as the case may be, and make each road responsible for its damage.

Q. And in your capacity as an inspector, have you had occasion to observe the train movements in the vicinity of the Stockton Yards of the Santa Fe, and these interchange tracks with the Southern Pacific and the Santa Fe?

A. I have. The main line of the Santa Fe passed in front of the interchange office, as well as the Western Pacific and the Southern Pacific. The three of them junctioned there.

Q. And you have become familiar with train movements in that vicinity?

A. Oh, yes; we naturally would.

Q. Are you acquainted with the practices there in effect with reference to train movements in that vicinity?

A. Well, the train movements there — for instance, cars moving into the Western Pacific yard —

Q. I don't care for you to be specific about

(Testimony of R. J. Kingston.)

that, I just want to know if you are familiar with the handling of trains and cars in that area?

A. Yes, sir.

Q. You have observed them over a period of 15 years. A. Yes.

Q. And you are familiar with the way these things are done and the way these things should be done? A. Yes, sir.

Mr. Ewing: Now, if your Honor please, we would like to [16] refer in connection with this witness to the map which has been made a part of this agreed statement of facts.

I don't believe that was marked in evidence. I think that it is in evidence by agreement, but perhaps for the purposes of identification it should be marked in some fashion. Should we call it Exhibit 1?

The Clerk: Your exhibit, sir?

Mr. Ewing: Well, I think it is a joint exhibit, is it not?

Mr. Tolbert: Yes.

(The document referred to was marked Joint Exhibit #1.)

Mr. O'Hara: Do you wish to put it on the board?

Mr. Ewing: It is too small for it to be of benefit to the Court by putting it at some distance. It may be possible for the witness to look at one copy while your Honor looks at the other, or possibly have the witness use the same copy up on your Honor's bench there. Which would the Court prefer? Per-

(Testimony of R. J. Kingston.)

haps if you would take a look at this, your Honor?

(Exhibiting document to the Court.)

The witness' testimony would hardly be intelligible unless he could point out on the map these matters that we are about to discuss here.

The Court: I suggest you put it on the blackboard.

Mr. Ewing: Would your Honor be able to see it from there? [17]

The Court: No, I will go down and look at it.

Mr. Ewing: Oh, all right, fine.

(The map was placed upon the blackboard.)

Mr. Ewing: Q. Now, Mr. Kingston, if you will step down from the stand here, I would like to have you point out first on this map, if you will, the location of the interchange track with the Southern Pacific as it existed here in April of 1944.

A. Well, it left the Santa Fe main line at this point here, followed this track around here, and went up this street up here for about four more blocks (indicating on map).

Q. Now the point where you are indicating is diagonally across a block shown on the map numbered 284 and then up along the side of a block numbered 278?

A. 278, yes sir, across Hazelton Avenue here.

Q. Now that is the interchange track with the Southern Pacific. Will you point out where the main line of the Santa Fe runs in that vicinity?

A. The Santa Fe main line runs right across here (indicating on map).

(Testimony of R. J. Kingston.)

Q. That is at the base of the square marked 285?

A. Yes, sir. Right there (indicating).

Q. And the interchange track takes off there between 284 and 285? A. Yes, sir.

Q. Now will you point out where the main line runs to the Mormon Yards of the Santa Fe?

A. The main line follows right on through there (indicating). That would be the main [18] line right there (indicating).

Q. The main line then continues east along the base of these squares numbered 285, 286, 287 and 288 until it enters these switching yards or tracks which are designated "Mormon" in the space above, is that correct? A. That is correct.

Q. All right. Now, Mr. Kingston, with reference to cars on the interchange track with the Southern Pacific, at the point that you have indicated on this map, in order to switch out defective cars which may have been in any cut on that track, what was the practical way to remove those defective cars?

A. Well, if the car was defective any place before this track here (indicating), the way they would do it—have to do it would be to come down over here (indicating)—there is no switch at all until they arrive down here at the crossing (indicating), in other words of the Mormon Yard #1 track. That is where they take the interchange cars up into the yard.

Q. Then if I understand you correctly, in order to disconnect a car which was in a cut in this vicinity the practical way would be to take the cut up to

(Testimony of R. J. Kingston.)

the Mormon yard and there disconnect it and return it, is that correct? A. Yes.

Q. Can you explain to the Court why it would be impractical to handle it otherwise?

A. Well, there is no possible way that they can make the switch. If they had it in the cut they would have to take it on out, because there is a spur in here (indicating on map) — [19]

Q. Suppose we take it spot by spot. I notice here right at the juncture of the interchange track with the main line of the Santa Fe, right at the base of the square numbered 285, that there is a switch where the interchange track takes off from the Santa Fe. Why, if it is a fact, is it impossible to switch cars at that point?

A. That is on the main line of the Santa Fe. The switch there is governed by the tower. That switch cannot possibly be thrown. In other words, to switch it has to go on through. It cannot be done on the main line. This is the same way (indicating).

Q. Now you are indicating another switch which appears over here under square 286 (indicating)?

A. Yes.

Q. Now why would it not be practical to disconnect the cars at that point?

A. At that point the switch also is governed by the inter-locking tower. When the main line is lined up, that switch is closed and that is also locked and you cannot possibly go on that spur when the Santa Fe main line is lined up.

Q. Now referring to the interchange track which

(Testimony of R. J. Kingston.)

is back up here between squares 277 and 278, why would it not have been practical as an operating matter to have disconnected the cars up in that vicinity?

A. You mean leave the car?

Q. To have dropped out the defective car up in that vicinity.

A. There is no place up in there for the Santa Fe to perform that operation. That is a single track. There is only one [20] track they have available for their interchange, and there are no tracks in there to perform switching operations.

Q. Now at this time, last April, 1941—your Honor may take judicial notice of this—was the traffic—the movement of passenger and freight traffic over the main line track of the Santa Fe in this vicinity heavy or light?

A. Well, the traffic over the main line is heavy, that is, across the main line there.

Q. Then even assuming that it were possible to have used either of these switches that come out onto the main line of the Santa Fe, what effect would that have had on main line traffic if those switches had been used or if they could have been used?

A. They would delay the traffic not only on the Santa Fe but on the Western Pacific. When you cross the Western Pacific main line here, the interlocking plant ties that up also. It would no doubt delay the traffic both east and west on both roads.

Q. Now, Mr. Kingston, with reference to this Southern Pacific transfer track, will you point out

(Testimony of R. J. Kingston.)

where the Western Pacific transfer track is on this map?

A. It follows right along the Western Pacific main line and curves along here into the Santa Fe (indicating on map).

Q. At the point where it makes the curve and into the Santa Fe main line, it is approximately diagonally across the block numbered 291 on the map? A. 291, yes.

Q. Now is that transfer there a single track or double track? [21]

A. It is a double track, one receiving and one waiting.

Q. Do you know what the capacity of those tracks are? A. They are 40 cars.

Q. 40 cars? A. 40 cars each.

Q. Is that the normal number of cars that are offered in exchange going in each direction?

A. That is the normal amount.

Q. And I suppose in April with conditions like they were normally 40 car cuts were filled out in order to offer them in interchange?

A. That is correct.

Q. Now will you explain to the court what movement took place in putting cars on to this Western Pacific interchange track? By that I mean were these cars shoved on or pulled on or both, or how were they handled?

A. Well, they were both. When the Santa Fe would deliver, they would have the W.P. cut of cars in their yard, they would hook the switch engine

(Testimony of R. J. Kingston.)

onto the cars and come down here right around the interchange and most of the time the transfer engine would pull them, and the W.P. would do likewise. The Santa Fe would pull down here and shove this Western Pacific cut out, and the Western Pacific, of course, would likewise.

Q. Now to get it straight, as I understand you, the only type of movement would be for the Santa Fe to put their engine at the head or lead end of a string of 40 cars, pull it on the Western Pacific interchange, then drop the engine off the front end, [22] switch it off of that track, back it onto the other interchange and shove against—behind the cut of cars which had been left there by the Western Pacific and push it on into the Santa Fe yards?

A. That is correct.

Q. Now assuming that type of movement, would it have been possible to have disconnected a defective car which was in that cut of cars while that car was on the interchange track?

A. No, sir. In making that move you can see it would be impossible—there is no way that they could cut that car out. They would have to take it on out here—

Q. You say it would be impossible. Can you tell us why it would be impossible?

A. There is no way—they are shoving this cut of cars—there is no switch or any track here where the car could be set out.

Q. That is because the other track is full of cars that were just brought in, is that the situation?

(Testimony of R. J. Kingston.)

A. In this case it wouldn't make any difference, they couldn't set it out anyway.

Q. But assuming that they could set it out, the cars that the Santa Fe had pulled in on the track would completely occupy one of the interchange tracks? A. Oh, yes.

Q. And then, of course, the Western Pacific cars would occupy the other interchange track?

A. That is correct.

Q. So there could be no switching between them where they were full of cars, is that the situation?

A. That is the way it is.

Q. Now assume the other type of movement. Assume that instead of pulling this cut of cars on the interchange and shoving the Western Pacific cars out of the interchange that the Santa Fe shoved in their cut of cars and pulled out the Western Pacific cars. Would it have been practical to have dropped out any defective cars from such a cut before arriving back at the Mormon yards of the Santa Fe? In your opinion would it have been or not?

A. Well, if they pull—

Q. First just answer that and then you may explain, if you please. A. Yes.

Q. It would have been? A. Possible?

Q. Practical.

A. Practical? If this track was full it would not. There would be no place to put them, because if this track was full—well, if they switch them out, they would have to switch across this street crossing

(Testimony of R. J. Kingston.)

and this street crossing and block the Santa Fe main line crossing (indicating on diagram).

Q. Then if I understand you, if the interchange track were full of cars it would be impossible to disconnect them? A. Yes, sir, it would be.

Q. And if it weren't full, it would be impractical for these various reasons? A. Yes, sir.

Q. And those reasons are again, sir?

A. Well, your switch is right there, right at the edge of this [24] street crossing.

Q. You are referring to a point just above block 307?

A. 307. This is Pilgrim Street (indicating on diagram), the main street for this part of town. There is traffic on that street and they would block that street to do any switching.

Q. And would that create a hazard to the public?

A. Well it would, yes, because there is no protection there except flagging by trainmen.

Q. Now the next point back there—

A. Well, there is the other street.

Q. What street is that?

A. There is Ophir Street.

Q. Switching in that vicinity would also block that street? A. Yes, sir.

Q. What, if any, effect would switching movements there have on the main line trunk of the Santa Fe?

A. The main line switch from the Santa Fe to their yards is located just on the other side of Ophir Street, and that switch-over is used for passage of

(Testimony of R. J. Kingston.)

both east and west bound main line trains, and if they got up there it would block them in their movements.

Q. Now tell me, Mr. Kingston, would there have been any difference in the amount of work by the men who were handling these movements—any difference in the amount of handling of these cars if they could have been disconnected right at the switch [25] onto the interchange as compared with the disconnection back in the Mormon yards?

A. I don't just get that.

Q. Perhaps I didn't make myself plain. To switch one of these defective cars out of the string or cut of cars requires certain switching movements. Does that require the same number of switching movements whether it be done up on a switch at the interchange or whether it be done back in the Mormon Yards?

A. The same amount of movements would be taken to switch at either place.

Q. So that the men working those cars would do the same thing whether they did it on the interchange or back in the Mormon yards?

A. That is right.

Mr. Ewing: I think you may examine.

Cross Examination

Mr. Tolbert: Q. Mr. Kingston, I want to refer to this map again to clear up a few little points. I believe you testified with respect to this Southern Pacific interchange, that is, the one in block 284, as I understand, that track is used by the Southern

(Testimony of R. J. Kingston.)

Pacific to deliver cars to the Santa Fe and also used by the Santa Fe to deliver cars to the Southern Pacific. That is correct? A. Yes, sir.

Q. It is what you call a joint interchange track?

A. Yes, sir.

Q. And I believe you testified that these cuts of cars sometimes are pushed over there and sometimes pulled over there? [26]

A. Not this track. They are always pushed.

Mr. Ewing: You are referring to the Southern Pacific?

Mr. Tolbert: I am referring to the Southern Pacific, the first cause of action.

Q. I believe you also testified that there was no place along here that you could switch these cars out, that it was necessary to haul them all the way to the Mormon yard, is that correct?

A. At this specified point here (indicating).

Q. These two points (indicating)?

A. That is right.

Q. And the reason you say they can't be switched out is because this switch between blocks 285 and 291 is controlled from the interlocking tower?

A. From the interlocking tower, yes.

Q. And the same is true of this other switch—where is that?

A. Right here (indicating on diagram).

Q. At the bottom of 286 at the right hand corner, I believe? A. Yes.

Q. Then if that be true, how can the Santa Fe use this line at all if it can't use those switches?

(Testimony of R. J. Kingston.)

A. Those switches are double switches. The main line is split there and there is a derail, so those two switches are locked together. If the Santa Fe main line is lined up, there is a derail here (indicating), and when this switch is open to go to the spur track, they are locked (indicating).

Q. Perhaps you didn't understand my question. You can get a [27] movement from this first switch on to the main line by having the towerman throw the switch, is that right?

A. Not unless he goes away back here.

Q. Well, it isn't impossible to get cars back there by having the towerman throw that switch, is it?

A. It is impossible; he can't throw that switch.

Q. The towerman?

A. Not unless the train moved back to here (indicating), the train must move back to here (indicating).

Q. If the train does move back to this second switch between 287 and 318, then the towerman can throw the switch, is that correct?

A. If it moves over there, that automatically relieves the towerman and he can throw that switch.

Q. And they can be set back here (indicating) without being hauled over to the Mormon yards?

A. Well, they can't set back within this tower, they have to be moved over across this tower.

Q. But they can be set back there a sufficient length to cut the bad order car out, and then go on with the good order cars, is that correct?

A. That wouldn't work at all, because this here

(Testimony of R. J. Kingston.)

interlocking tower—there is one, two three— there is three streets you have to set them out; you would have to set them away out here (indicating on diagram).

Q. That is about two blocks?

A. Two and a half blocks.

Q. Now, the interchange, I see on this interchange track at 284, when you get up here in the upper right hand corner there [28] is another track (indicating on diagram). Why can't you set the cars out there?

A. That track is a joint track with the California Packing Corporation. Many times the California Packing Corporation have delivery of cars that come to them there to be loaded, empty boxes; sometimes it is used for an interchange track, but not always.

Q. But what I am getting at is that track could have been used for the necessary switching to disengage this defective car from the other cars, could it not?

A. In some cases it could, and in some cases not. If it was full—

Q. In respect to these violations that occurred, as you recall, on April 6th and 7th, you have no recollection at this time as to whether at that time those tracks were full or not, do you?

A. No, sir, I haven't. I couldn't tell you.

Q. Now what would happen if the Southern Pacific brings this cut of cars over there and you inspect it and you find a defective car in there and

(Testimony of R. J. Kingston.)

you bad-order it, you would leave the whole cut there and say to the Southern Pacific, "Come and get it, we won't touch it?"

Mr. Ewing: Just a moment. If I understand that question right, I don't believe it has any materiality. That is a matter of law, isn't it?

Mr. Tolbert: No. The point I am trying to bring out is that since they discovered that car was defective and under [29] the law they can't move it for purpose of repair, knowing that why did they haul it over to their yard, why didn't they leave it there? That is the point.

Q. That could have been done, couldn't it?

A. Well—

Q. I am not trying to confuse you.

A. I am confused there.

Q. Well now, let's get it straightened out. Take this particular case, this first count. They came over there with a cut of cars, I don't know how many there was, but you inspected them and you found one of the cars defective. That is correct?

A. That is correct.

Q. And you knew you didn't want it, but instead of leaving it there the Santa Fe comes along and hauls it over there (indicating on diagram). My question is why wasn't it just left there, the whole outfit? A. My duties—

Mr. Ewing: Just answer that, just tell him why you didn't leave that particular car.

Mr. Tolbert: I mean the whole cut of cars.

Mr. Ewing: All right, the whole cut of cars.

(Testimony of R. J. Kingston.)

A. Of course my position doesn't say what they shall move and what they shan't move. What I did was find the car, card the car, and set it back to the Southern Pacific.

Mr. Tolbert: Q. And your job is done?

A. The report is in. [30]

Q. That is right. Now that has been about six months ago. Do you still do the same things with those cars when they are delivered to you by the Southern Pacific as you did before?

Mr. Ewing: We object to that, if the Court please. We are not charged with what we are doing now.

The Court: The objection is sustained.

Mr. Tolbert: All right. Exception.

Q. Now you spoke about bringing these cars down on the main line, coming across Pilgram Street and South Ophir Street, that it would be a hazard to the traffic to have those cars pulled down there, as I understand you?

A. Well, it would be a hazard to the traffic.

Q. Aren't those crossings protected by wig-wag signals?

A. Not on a transfer operation. They are on main line moves.

Q. In making this movement from the S. P. interchange over to the Mormon, don't you use the main line?

A. Excuse me. I thought you meant the Western Pacific.

Q. I am talking about the Southern Pacific.

(Testimony of R. J. Kingston.)

A. Yes, sir. On those moves the wig-wags move.

Q. So there would be no more hazard for this cut of cars to occupy the crossings than it would be for any other cut of cars or any other trains?

A. No.

Q. And it is often necessary to occupy crossings. That is what goes with railroading. Now suppose we take these deliveries from the Western Pacific to the Santa Fe. Now you testified [31] that they came in here (indicating on diagram),—is that Union Street? A. Yes, sir.

Q. And the interchange track cuts across diagonally over to Block 291. Now how does the Western Pacific bring in their cars?

A. Well, they bring them two ways. They push them in and they tow them in—pull them in.

Q. Assuming they pull a cut of cars in, that means the engine is on the head, how does it get back?

A. It comes up to this switch (indicating on diagram) and goes back here (indicating on diagram).

Q. Is that switch—that is a switch between 286 and 291—is that controlled by an interlocker?

A. No; that is hand thrown.

Q. Then if the locomotive can come back on this other track (indicating on diagram) that means that track is open, does it not?

A. It is open if there are no cars there.

Q. If there are cars on it, can the locomotive get back?

(Testimony of R. J. Kingston.)

A. You mean on the Western Pacific?

Q. I mean on the Western Pacific, yes.

A. If there are cars on it going to the Western Pacific, the Western Pacific pushes them off.

Q. Then if the locomotive is on that track then that track could also be used to switch out bad order cars, could it not?

A. Providing there is no cars on it.

Mr. Ewing: Did you say the Western Pacific?

Mr. Tolbert: No, the Santa Fe. In other words, to make it clear, if the Western Pacific locomotive can use that track for the purpose of getting back, why can't the Santa Fe locomotive use that track to switch out the bad order cars?

A. Well, in many cases the Santa Fe would fill this track from one end to the other, and if the Santa Fe comes in there and has two bad order cars, there would be no place to put them.

Q. Of course, at this late day you don't know whether that track was filled or not, do you?

A. No, sir, I don't.

Q. Now this car that we received from the Southern Pacific, and the three cars that were received from the Western Pacific—perhaps I should ask you this question later on—it is your sole job to inspect the cars and to put on the bad order tags, and then if they move them, that is somebody else's job, isn't it?

A. That is right.

Q. Now are you familiar with the defects on these particular cars, just what they were?

(Testimony of R. J. Kingston.)

A. I believe so.

Q. And you are the joint inspector and you have had quite a bit of experience in supervising the making of repairs, have you not?

A. Yes, sir.

Q. Now in order to make these repairs, is that much of a job?

Mr. Ewing: Now, just one moment. If the Court please, I think this is something I ought to call to your attention, if your Honor wants to hear it, and perhaps we will later—it will be satisfactory with me—but under this stipulation we [33] have reserved the right to object to such portion of it as might not be material. Counsel's question here raises that question of the possibility of repair which is also mentioned in the stipulation of facts to some extent. Now we contend that whether or not these cars could have been repaired at the interchange track is immaterial in this proceeding for the reason that we refused these cars in interchange, as we had the right to do; that the sole duty of repairing these cars rested on these two railroads who wrongfully offered those cars in interchange to us, and that since the duty never devolved upon us and could not devolve upon us to repair the cars, that it is immaterial as to how easy or how hard it may have been to make these particular repairs.

Our whole position is that we refused these cars and that we made only the movements that were practical and necessary to get the defective cars

(Testimony of R. J. Kingston.)

disconnected from the non-defective cars and get the non-defective cars off the interchange track, and that we pushed these cars that were defective back to where thy had been offered to us, to the railroad whose duty it was to take care of them, to take care of those necessary repairs.

Understand, your Honor, that it was a violation, as counsel knows, for those cars to have been offered to us in the first place.

How easy or how hard it was to repair those cars is not pertinent in this case. The only question before us now is did [34] we move those cars more than was necessary or practical in order to separate them from the non-defective cars which we had a right to pull off the interchange.

Mr. Tolbert: If your Honor please, the Government's position in that respect is that cars with defective safety appliances cannot be moved at all. There is a proviso that says that cars may be moved for purposes of repair, but that move for purposes of repair is limited to the carrier upon whose line or railroad the car became defective.

Manifestly these cars did not become defective upon the line of the Santa Fe; they became defective before the Santa Fe received them. And the requirements of the law are absolute. The purpose of the law is not to collect a penalty, but the purpose of the law is to provide protection to the employees and the traveling public.

From our experience we hope to show that these defects were of such a nature that it was not neces-

(Testimony of R. J. Kingston.)

sary to move them at all—understand, this carrier was not moving them for the purpose of repair; counsel is right when he said they were moving them in order to cut them out and set them back—but having in mind the purpose of the law, the remedial features of the law, that instead of making these minor repairs—that is, the repairs are minor, but the defects carry with them potential danger, that instead of hauling these cars all the way down to the Mormon Yard—I suggest that is somewhere between a half [35] to three quarters of a mile; it is in the stipulation—exposing that crew to the dangers incident to these defective cars—three of them are couplers, and we all know of old railroadmen, a lot of them had fingers cut off and hands cut off and some of them even had heads cut off—they subjected these employees to the dangers of hauling the cars down to the Mormon Yard, and the stipulation will show that these cars were down there some few hours—I think the longest period was 24 hours—anyway from 12 to 14 hours—I don't know what was done with them while they were down there, probably the necessary switching, and then they were hauled back, and there were two separate and distinct movements, two separate and distinct train crews, and we propose to show that if this carrier had in mind the purpose of the law and the protection of its employess that defects of this character could have been repaired there, and that was the purpose of the question that I had in mind, which was over-

(Testimony of R. J. Kingston.)

ruled a few moments ago, to show that perhaps they are not doing the same thing today as they did six months ago.

Mr. Ewing: Well, if it please the Court, counsel has gone into it, and I think it is perfectly all right to go into it so the Court will know where we stand on this matter. We are just as cognizant as counsel is of the reason for the safety appliance law, and I think your Honor can see from the testimony of this witness that we are bringing out that thing exactly. But the safety appliance law, as counsel says, doesn't in the [36] first place upon us the duty or obligation of repairing cars which are received in interchange in a defective condition. As a matter of fact, if I did at this time in this stipulation agree that we removed those cars or touched those cars for the purpose of repairing those cars, I would have to confess judgment in this case, because the law does not give us the right to take cars from another carrier and repair them. The law gives us just one right, to refuse those cars, but as a practical proposition—the courts have said, as counsel agrees, as a practical proposition you are entitled to take those cars off of the non-defective cars, otherwise you would have, as counsel here a moment ago suggested, leaving the whole cut of cars there, you would have 39 non-defective cars blocking an interchange track under conditions that are now prevailing so as to prevent the mere switching movement involved in removing one defective car.

(Testimony of R. J. Kingston.)

Now counsel says we subjected this crew to a possible hazard in taking this car out. We subjected this crew to no hazard other than would be the hazard involved in removing the one defective car, which we had a right to disconnect at any point where we sought to disconnect it. This witness has just testified that the movements necessary to disconnect the defective car were exactly the same whether they took place here (indicating on diagram) or at any place here (indicating on diagram). The only difference is the car rolls three quarters [37] of a mile more. There are no more men going between the cars, there are no more men trying to couple and uncouple cars whether they roll three feet or three hundred yards or three quarters of a mile, and counsel will admit that the length of the movement involved in this case has no bearing whatsoever on whether or not a violation exists.

Now we performed the same movement that would have been done if it was possible or practical to do it on the interchange track.

We had no right to remove those cars for the purpose of repair, and therefore the question of the difficulty of repair or how minor these defects were from the standpoint both of hazard and of repair, is not pertinent.

Mr. Tolbert: I just want to say a word in reply to that. As to our position, I didn't apparently make myself exactly clear. These cars were on the interchange track. One was the S. P. inter-

(Testimony of R. J. Kingston.)

change track, and the other was the Western Pacific interchange track, and while there was no duty placed upon the defendant to make repairs to the cars—in fact, they could not haul them for the purpose of repair, but they had two alternatives: The cars had just been set over there on the joint track, and technically speaking you might say that the delivery was completed, but it wasn't actually completed until the Santa Fe hooked onto it and hauled it over there into their yard, and it seems to me that they had two alternatives. One was to go ahead [38] and repair these cars right where they stood or to have left the whole cut where the Southern Pacific left them and tell them to take them back. That was the purpose of asking that question.

The Court: Well, did they do either?

Mr. Tolbert: What is that?

The Court: Did they do either?

Mr. Tolbert: What they did was to haul the whole string of cars over here and keep them there several hours, and we don't know—I don't suppose anybody knows what was done with them over there, but they were switched around, whatever was necessary to be done—

Mr. Ewing: I think the stipulation of facts says they were simply cut out.

Mr. Tolbert: And one was hauled back to here (indicating on diagram) and the three were hauled back to the Western Pacific. The incidental hauling that was necessary to disconnect the bad-order

(Testimony of R. J. Kingston.)

cars from the good-order cars we don't raise any question as to law in that case. The 6th and 9th circuit have passed on that, and I think they have not only laid down good law, but they have laid down good common sense. But we don't think that that mere incidental hauling—that those conditions arose over here at the interchange point.

So, your Honor, the question I asked was whether, as I recall it, was whether those cars could have been readily repaired on the respective interchange tracks, and that was the [39] question, I believe, that counsel objected to.

Mr. Ewing: That is correct.

The Court: The objection is overruled.

Mr. Tolbert: Q. You may answer the question then. Perhaps after all of this you have kind of lost it. The question that I asked was—I believe you said that you knew about the defects, that is you knew of the type. The question I am asking you is whether the repair to the car that was on the Southern Pacific interchange track, which was a disconnected uncoupling lever, as I recall it, and the repair to the cars that were on the Western Pacific interchange track, could they have been repaired there?

Mr. Ewing: For the purpose of the record, may we save our objection to that, your Honor?

The Court: Yes.

Mr. Tolbert: Go ahead and answer the question.

A. To repair this car on the Southern Pacific?

(Testimony of R. J. Kingston.)

Q. I am speaking about the interchange track, you understand?

A. The interchange track, the defective car, it would require uncoupling all those cars, a switch engine to move them apart, and to get material and repair it. If that is the correct one I understand.

Q. Well, with respect to the first cause of action —we will just find what was wrong with that car. It says that that car there had a type E coupler —that is one of the newer couplers—[40] and that you had a single top cut rotating lever—that is, came over the top—and that the nozzle was not connected to the lock block. In other words, there was no connection between the uncoupling lever and the lock block, it had come apart.

Mr. Ewing: Counsel, may I have a stipulation that we object to all of the questions concerning the difficulty of repair?

Mr. Tolbert: Yes.

Mr. Ewing: So we won't have to interrupt further.

Mr. Tolbert: Yes.

The Witness: As I understand, the top—the coupling was disconnected within the body of the coupler.

Mr. Tolbert: Q. I don't believe the petition says that. It says the uncoupling lever was disconnected from the lock block, and referring to the original report—I was just going into it in detail—

(Testimony of R. J. Kingston.)

Mr. Ewing: We stipulated as to what the defect was. You might read the stipulation.

Mr. Tolbert: Yes, we will see what it says there.

From the stipulation, this was a Wabash car, equipped with a type E coupler, top operated. The top operated tozzle had the bottom U connection spread, which allowed it to separate from the lock block. And it also says to repair this condition it was necessary to remove the knuckle and the lock block and apply complete new uncoupling mechanism. [41]

A. That is correct.

Q. How much of a mechanism would that mean?

A. That is the operating mechanism within the body of the coupler. It requires an engine to disconnect the cars, take out the knuckle, take out the defective parts and put them back in.

Q. How long would you say that would take? As a practical railroad man.

A. It would depend on a number of things, the availability of the material you had, the time it would take to get a switch engine there to disconnect the cars—I couldn't state definitely what the time was because there is too many things involved.

Q. Suppose we pass on to the next cause of action. That related to Central of Georgia flatcar 11138. It says there that the coupling and uncoupling apparatus on the AN of said car was out of repair and inoperative, the uncoupling lever on the AN of the car being fouled by the lading.

(Testimony of R. J. Kingston.)

A. That was a load of lumber, and the coupling level would come up and hit that lumber, which prevented it from operating.

Q. How would you fix that?

A. The load would have to be shifted back to the end of the car by a switch engine or transferring the lading.

Q. The next car is ACL boxcar 18088. It says here that at said time and place said car was defective in that the coupling and uncoupling apparatus on the AN thereof was out of repair and inoperative, the lock block of coupler on said AN of said car [42] being inoperable, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers, coupling automatically by impact. That is all it says there—oh, here it is here—that the ACL boxcar number 18088 was a D top operated coupler with a number 2 lock lift which had worn until the anti-creep feature stuck in the knuckle lock, thereby making it inoperative. In other words, you had a jammed lock there?

A. Yes.

Q. What was necessary there?

A. In that particular case you would have to disconnect the cars and go through the same performance as on the last one, and either to replace it or they have a way of putting a little washer around the top of the lifter.

Q. I think that is all on that, because in the stipulation in regard to the fourth count it says

(Testimony of R. J. Kingston.)

here they had a bent hand hold there. That could be repaired by straightening the hand hold by the use of a bar.

Mr. Ewing: May I at this time, in case I didn't make it clear for the record, also, your Honor, we reserve the right in this stipulation to object to the immaterial portions of it, and to those portions of the stipulation which go to the question of the possibility of repair I would like to interpose the objection that that is wholly immaterial, irrelevant and incompetent in this proceeding. [43]

Mr. Tolbert: As I understand, Mr. Kingston, you are what is called the Joint Interchange Inspector?

A. Yes, sir.

The Court: Do you wish me to rule on that now?

Mr. Ewing: If you care to, your Honor, or you may reserve it.

The Court: Did you head the objection?

Mr. Tolbert: No.

Mr. Ewing: I made the objection with respect to the stipulation that anything that went to the question of the possibility of repair is incompetent, irrelevant and immaterial, the same objection I have made to your whole line of questioning concerning repairs on these cars.

Mr. Tolbert: Was that directed to this question?

Mr. Ewing: It was directed specifically to the last paragraph on Page 9, and to any other para-

(Testimony of R. J. Kingston.)

graphs where the question of the possibility of repair is raised.

Mr. Tolbert: If the Court please, counsel for the defendant drew this stipulation. He put that in there himself. Now he wants to object to it.

Mr. Ewing: No, I don't object to the fact, my objection goes to the materiality. I was trying to be fair in the stipulation of facts, so the issue would be before the Court.

Mr. Tolbert: I will just let it stand as it is. I am not questioning on that. [44]

Getting back to this other question, you are the Joint Interchange Inspector?

Mr. Ewing: I don't believe your Honor ruled on that.

The Court: The objection is overruled.

Mr. Tolbert: You do this inspecting not only for the Santa Fe, but for the Southern Pacific and Western Pacific as well?

A. Yes, sir.

Q. Do you make any repairs there yourself?

A. If they are practical, we do—that is, if they are possible.

Q. What type of repairs would be possible?

A. Well, supposing you had a brake shoe missing on a car, a running board bolt, minor repairs of that nature.

Q. Any defective uncoupling levers?

A. Yes, where it requires just a cut washer, cleavise or a link.

The Court: Where are the cars located?

(Testimony of R. J. Kingston.)

Mr. Ewing: Where are they now, you mean?

The Court: Yes.

Mr. Ewing: I guess that—this happened last April—

Mr. Tolbert: They are all over the United States.

Mr. Ewing: I might add here they were repaired by the companies that put them on the interchange tracks. I think that is true, counsel?

Mr. Tolbert: I think so. We have no knowledge of that. I don't know.

Mr. Ewing: We will assume that. [45]

Mr. Tolbert: Q. You say you make repairs to certain types of defective couplers, and I suppose the same would be true of bent hand holds, would it not?

A. In many cases, yes.

Mr. Tolbert: I believe that covers everything. I would like to make this statement to the Court, that this case,—I should have made it in the beginning—is based on the movement of these cars from these interchange tracks to the defendant's Mormon Yard. Now what happened after they got over there we don't know, but we did agree to the stipulation that the defective cars were hauled back and presumably were repaired. It is only on the movement we are bringing suit.

Mr. Ewing: Have you finished with your cross examination?

Mr. Tolbert: Yes.

(Testimony of R. J. Kingston.)

Redirect Examination

Mr. Ewing: Q. Mr. Kingston, of course any time that a crossing is either blocked or when cars are moving backward and forward, it presents some traffic hazard, does it not?

A. Yes, sir, it would.

Q. And the more frequent the occupation of any such crossing, the greater the hazard that exists, regardless of protection, is not that true?

A. Yes, sir.

Q. So that to the extent that these switching movements were made there and to the extent that they would increase the period of time that trains were moving over that crossing, the hazard [46] would be increased to that extent?

A. Yes sir.

Q. Now in these several cuts of cars were there other cars besides these defective cars?

A. Yes, there were.

Q. And in each instance there were a number of other non-defective cars? A. Yes, sir.

Q. Now when the Santa Fe went in and pulled that cut out, did they seek those non-defective cars?

A. That was their purpose for coming down there and pulling the cars.

Q. So when counsel asked you why they pulled the cut out, that was for the purpose of getting the non-defective cars, was it not?

A. Yes, sir.

Q. You were working right there on these inter-

(Testimony of R. J. Kingston.)

change tracks during the month of April, 1944, were you not? A. Yes, sir.

Q. Do you have a definite recollection as to whether those tracks, those interchange tracks were being used frequently during that month?

A. Yes, they were used continually. That is, cars either going in one direction or the other continuously.

Q. There was a heavy movement across both those interchange tracks? A. Yes, sir.

Q. Would it be correct to say that most of the time those interchange tracks had cars on them?

A. That is correct. [47]

Q. So, while you don't remember the number of cars at the particular moment this defective car was on it, you do have a definite recollection that these tracks were full practically without exception during the month of April, 1944?

A. Yes, sir.

Q. I suppose you even had cars backed up on the Southern Pacific, Santa Fe and Western Pacific trying to get across those interchange tracks, did you not? A. That is correct.

Q. Now I understood you, in answer to counsel's question about these repairs—

Mr. Ewing: You understand, your Honor, I go into this only because of your Honor's ruling, while reserving my position on the matter.

Q. You men there on the interchange tracks had the tools and equipment only to perform the most minor type of repair? That is true? A. Yes.

(Testimony of R. J. Kingston.)

Q. And with respect to these first three cars that counsel asked you about and the defects that existed, did you have the facilities or the tools to make those repairs?

A. No, sir, we didn't have the materials.

The Court: Q. Well, was there such material present where you worked and shops for repairs of that sort?

A. Not right out on those interchange tracks, no, sir.

Mr. Ewing: Q. I might ask you, if you know, where were those cars repaired? [48]

A. I don't know.

Q. Where would they normally be repaired?

A. Back on the delivering line repair track.

Q. Repair track?

A. Repair track. That is where they normally would be repaired.

Q. And that is the place where facilities are available for the repair of cars?

A. That is true.

Q. In making the class of repairs involved on these first three cars, would there be any greater hazard to the repair men to make those repairs on the interchange track than on a repair track?

A. Well, there would be considerable hazard on these interchange tracks. We are governed by protection of a blue flag and that is not always dependable, particularly where it is right in the Southern Pacific yards, and on the repair track you have the protection of a locked switch. You haven't the

(Testimony of R. J. Kingston.)

danger of switch engines running into your cut of cars. On the interchange tracks, particularly on these, there was five or six switch engines that were running around there all the time.

Q. In other words, those men who attempted to make a repair on the interchange track would have to be in between these cars where trains are operating on two lines of railroads on different sides of them and there is always an existing possibility that somebody would shove in a cut of cars on them? A. That is true. [49]

Q. That hazard would not exist on the repair track? A. No, sir.

Mr. Ewing: That is all.

Recross Examination

Mr. Tolbert: Q. In regard to this blue flag business, that is a practice on all railroads for the protection of car repairmen?

A. That is correct.

Q. As a matter of fact, the car repairmen do depend on that protection?

A. To a great extent, yes.

Q. Of course we know that there hasn't been a rule made that has not been violated many times, even on repair tracks? A. That is true.

Q. And if these cuts of cars were protected by the blue flags all the railroadmen working in the yard know what a blue flag means, don't they?

A. That is correct.

Q. That is, that there are men working there and not to go in there? A. That is correct.

(Testimony of R. J. Kingston.)

Q. I don't know whether I understood you on one answer here. You say the purpose of hauling the cut of cars over to Mormon was to get the non-defective cars, is that it, or the defective cars?

A. To get the non-defective cars.

Q. Now you spoke about not having the tools. What tools do you carry on this job?

A. Well, a car inspector carries mostly bad-order *cars*.

Q. He carries a hammer, doesn't he?

A. Yes. [50]

Q. Anything else?

A. Well, gauges; generally has a small wrench.

Q. Not any of the smaller materials for making repairs?

A. Outside of a cotter key, something like that.

Q. Any cleavise bolts?

A. A nut, something like that.

Q. One other question: You say when these cars are shoved in there that you inspect them and put these bad-order tags on them?

A. Yes, sir.

Q. What is the purpose of those bad-order tags?

A. ARL rules require that cars rejected in interchange for bad conditions be carded on both sides, and in compliance with ARL rules we put that card on there to notify trainmen and switchmen that they are in bad-order.

Q. Then do I understand that you are on the interchange track not for the purpose of making

(Testimony of R. J. Kingston.)

any repairs but simply to put these bad-order tags on, is that correct?

A. We are there to protect receiving lines—well, these bad-order cars—no, we put the bad-order cards on for whichever road that should make the repair, send them back to the road that they should be set back to—or put defect cards on them where they are side swiped or damaged, and make any like repairs like a cotter key or something we can make without any hazard.

Q. But you don't make any repairs that would involve uncoupling the cars?

A. No, because it is too uncertain as to time, take too long a time. [51]

Q. So when you put that bad-order card on there your job is done and whoever hauls it away is no concern of yours? A. That is correct.

Mr. Tolbert: I believe that is all.

Mr. Ewing: That will be all. Thank you, and the defendant rests, your Honor.

Mr. Tolbert: Could I ask you just one more question before you leave?

Q. Do you recall from memory any violations of the blue flag by any of your own switching crews over there?

A. No specific case. I cannot recall.

Mr. Tolbert: That is all.

Mr. Ewing: We rest.

Mr. Tolbert: I would like to call Mr. Madison and have him sworn.

CLEVE H. MADISON,

Called for the Plaintiff, in rebuttal, Sworn.

Direct Examination

Mr. Tolbert: Q. What is your position, Mr. Madison?

A. Inspector, Interstate Commerce Commission.

Q. Inspector of what?

A. Safe appliances.

Q. How long have you been such an inspector?

A. Since March, 1921.

Q. Have you had any railroad experience previous to that? [52]

A. Twelve years locomotive engineer, three years fireman.

Q. Now I believe you were one of the inspectors that furnished the information upon which these suits were filed. I am speaking to you now, you were out there in the yard, you have the advantage over some of us, and when these cars were delivered by the Southern Pacific in what is known as the Southern Pacific interchange track, you were there, were you?

A. I will have to consult my record.

Q. The record was made at the time, was it?

A. Yes, sir. The record was made at the time.

What is the number of that car?

Q. Where is my file? That is the first cause of action. That is Wabash boxcar 46354.

A. Yes, sir, I have a record of it—oh, pardon me, that is not it. Yes, sir.

Q. Now, Mr. Madison, based upon your experi-

(Testimony of Cleve H. Madison.)

ence as a railroad man, I think you said of some twelve years, and your experience as an inspector of safe appliances of some twenty-three or twenty-four years, I believe, you are, of course, familiar with railroad yards and equipment, are you not?

A. Yes, sir.

Q. Now when you made this inspection on this S. P. interchange and discovered the defective condition of this car, what would be your—

Mr. Ewing: One moment. I will have to object that that is a fact not in evidence. You assumed that he discovered this [53] defective condition.

Mr. Tolbert: All right. In making your inspection in the yards of defendant on April 4, 1944, did you inspect Wabash boxcar 46354? A. I did.

Q. What did you discover with respect to the uncoupling apparatus on the B end of the car?

A. I first inspected the car at 2:10 p.m., finding top of coupler on the B end, single top rotating lever and the tozzle nut connected to the lock block.

Q. Now as an inspector of safety appliances of something over twenty years, and as a railroad man of twelve years' experience, how much of a job would there be to make the proper repair to that coupler?

Mr. Ewing: May we object to that, inasmuch as this is new for this witness, we object that the amount of work which would be necessary to repair is wholly incompetent, irrelevant and immaterial as to any issue in this particular proceeding.

(Testimony of Cleve H. Madison.)

The Court: Are you acquainted with the situation and can you answer that question?

A. Yes, sir. I believe I can. I have seen it done so many times.

Q. That is what I want to find out.

Mr. Ewing: We don't complain about his qualifications, your Honor, just the relevancy.

Mr. Tolbert: Go ahead.

The Court: The objection is overruled. [54]

A. It was a very simple matter. The transfer engine must couple on the cut of cars to start with, and while they are coupled on it is a very simple matter to part the cars and make the repair. I am not positive that the material needed to repair this particular car was on hand at the interchange track on that day, but I have seen coupler repairs made on the interchange track, and this is a very simple matter. I would say thirty minutes would be ample time, and some inspectors could do it in five minutes.

Mr. Tolbert: Q. Well, while we are on that subject, we will go through with these other cars.

Mr. Ewing: I assume it may be stipulated that I may have this objection to the entire line?

Mr. Tolbert: Yes.

The Court: Yes.

Mr. Tolbert: Q. With respect to Central of Georgia flatcar 11138, did you inspect that in the yards of defendant on April 6th, 1944?

A. I did.

(Testimony of Cleve H. Madison.)

Q. What did you find there with respect to the coupler on the A.N. of the car?

A. I inspected it on the W. P. near Clay Street at 9:35 a.m. Had a type D coupler on the A.N., single top rotating lever, stay-right connection, load of lumber shifted to prevent center arm of uncoupling lever from operating the lock lift.

Q. Now from your experience previously alluded to, what would be necessary to make that repair?

A. The customary way upon some lines is for the switch engine to shove it against another car at speed—that is, uncoupled from the switch engine, and slip it back in the same way, have it slip forward just by the shock.

Q. Do you recall how many boards were hanging over this uncoupling lever?

A. The car was loaded with timber of various sizes, I think from 6 x 6 up to 10 x 10's.

Q. And I assume it was some of the bottom timbers that were fouling the coupling lever?

A. That is the only one that could, certainly.

Q. And is there another way that this repair could have been made?

A. Well, by transferring the load to another car.

Q. That other practice that you refer to of having the switch engine bump the car, have you seen that done? A. Many times.

Q. Is it efficacious?

A. I will say so. Too much so sometimes.

Q. Now with respect to ACL boxcar 18088, that

(Testimony of Cleve H. Madison.)

is the third cause of action, did you inspect that in the yards of defendant on April 7, 1944?

A. I did.

Q. What did you find with respect to the coupler on the A.N. of that car?

A. I inspected it as it was being delivered by the Western Pacific to the Santa Fe on the interchange track. [56]

Q. What was—

A. After the train stopped on the interchange track, found that the block lock on the A.N. of car was inoperative.

Q. In what manner?

A. The lock block was stuck and could not be moved. It wasn't possible for us to make an inspection that would find out the reason for the block not being so it could be moved.

Q. What would be necessary in order to make the proper repair?

A. To uncouple the car, remove the knuckle, and then the best way—that is, maybe not the best way, the usual way nowadays is to put in a new block and new lift. It would depend upon the nature. It might be stuck for the reason of some defects in there.

Q. What other way could it be repaired?

A. No other way except uncoupling the car and taking out the lock block.

Q. I mean with respect to the lock block itself, you say the practical way would be to put in a new lock block, is that right? A. That is right.

(Testimony of Cleve H. Madison.)

Q. Is there another way to repair it without putting in a new lock block?

A. Yes, they can be lifted out sometimes and they put on a washer or iron ring on the outside of the coupler to prevent it getting down to where it sticks.

Q. Does that have to be made of any particular material or design? [57]

A. No. Putting in a ring would be very simple, but it would be necessary to uncouple the car to get the lock block loose.

Q. Speaking from your experience—of course we realize no two lock blocks are alike—but from your experience as inspector would you say as to the length of time in making a repair of this type?

A. After the car was uncoupled, I would say ten minutes would be ample time.

Q. Now with respect to PRR boxcar 503205, that is the fourth cause of action, did you make an inspection of that in the yards of defendant on April 7, 1944? A. I did.

Q. And what did you find wrong with that, if anything?

A. The end sill handle on the B end, right side was bent against the end of the car. It was a metal end car—with no clearance.

Q. Did that destroy its efficiency as a hand hold?

A. It did.

Q. What would be necessary to make that repair?

Mr. Ewing: That is stipulated to.

(Testimony of Cleve H. Madison.)

The Witnes: Well, it might be repaired by putting a bar between the hand hold and the end of the car and pulling it out.

Mr. Tolbert: Q. Would it be necessary to uncouple the car for that?

A. No, it wouldn't. But there isn't any guarantee that that repair would always work, the hand hold might break.

Q. Have you seen repairs made in that manner?

A. Many of them. [58]

Mr. Tolbert: That is all.

Cross Examination

Mr. Ewing: Q. Then I understand from you it might be necessary to go further than that, even further than we have agreed it would be necessary to repair that handle, is that right?

A. Oh, yes, that is entirely possible, yes.

Q. When you speak of having seen some of these various types of repairs, such as would have been necessary or advisable on these three first cars made on interchange tracks, would you say that that is the usual practice, to make that type of repair out on switch tracks?

A. Are you referring to these particular interchange inspectors?

Q. That is right.

A. Yes, I would say they are the most ambitious crew that I have saw. They go out of their way to repair cars.

(Testimony of Cleve H. Madison.)

Q. They have been particularly conscientious in that regard?

A. The best bunch of inspectors I ever saw.

Q. Then if they didn't repair these, and they are conscientious, hard working interchange inspectors, that would indicate that wasn't the type of repair which they could as a practical matter have made on these particular cars?

A. No, it wouldn't have indicated anything of that kind.

Q. You don't think so?

A. No, it indicated that they had more work than they had time to do. [59]

Q. Generally speaking, are these types of repairs made on interchange tracks or on repair tracks?

A. Well, I think they are all—with the exception of the shifted load—all considered yard repairs.

Q. The shifted load you agree is not a yard repair?

A. Well, it is strictly a yard repair, but I made a difference between them because it would have been necessary to move this car with the shifted load at speed and let it bang into another car.

Q. You said that was one way that could have been done, but I think you indicated that would not be the best way to remedy the defect?

A. Of course the yardmaster's rule has something to do with that. If he can shift a load by bumping it with a switch engine, he is not going to hold the load up by sending it to the repair track.

(Testimony of Cleve H. Madison.)

Q. That wouldn't be the safest way to handle it, would it?

A. Bumping it into another car?

Q. Yes.

A. I can't say I have ever heard of anyone getting hurt that way.

Q. What is your opinion as an operating railroad man, would you say that would be the safest practice to shift that load or to have it done by having men move it timber by timber?

A. I have never heard of anyone getting hurt—

Q. You are not answering my question. Do you consider it the safest practice?

A. Well, I don't consider that what [60] I consider the best way would have any effect on how to shift these loads.

Q. I just want your opinion now. You have had a lot of experience.

A. Some would. That would be the proper way to shift some loads.

Q. Some loads?

A. And others—if it was finished lumber, fine lumber, they don't do that, because they don't shift easily.

Q. Do you grant, Mr. Madison, that the repairing of cars necessitating the going between cars would be more hazardous for repairmen even with blue flag protection where such repairs were performed upon an active, busy interchange track than it would be if—than they would be if they were

(Testimony of Cleve H. Madison.)
performed on repair tracks known by operating men to be repair tracks?

A. Interchange tracks are not busy and active when they are protected by blue flags on either end.

Q. You are assuming something that I didn't have in my question, Mr. Madison. How long did you observe these interchange tracks down there?

A. You mean up to now?

Q. Yes. A. I would say about sixty days.

Q. Has there been heavy traffic over those interchange tracks?

A. Oh, yes. Sometimes in cuts up to as high as forty.

Q. Do train crews ordinarily expect to find blue flags out on these interchange tracks?

A. They certainly do, and they certainly obey them. [61]

Q. Assuming that they obey them, don't you recognize that there is a human element in railroad operations affecting safety? You do recognize that, do you not?

A. Certainly, of course, but there isn't any rule in the book that is obeyed so religiously as the blue flag rule, because that means there are men working under cars.

Q. Well, you have known of instances of the blue flag being violated, have you not?

A. I can't say that I have.

A. A repair track is known by all the employees to be a place where repairs are habitually conducted, isn't that true? A. Pardon?

(Testimony of Cleve H. Madison.)

Q. I say, a repair track is known to the employees to be a place where repairs are ordinarily and customarily being performed?

A. Oh, yes, that is true, but no repair track is involved in this case.

Q. That is all right, but that is true, is it not?

A. Oh, yes, certainly.

Q. So that trainmen going in on tracks known to be repair tracks have that thought in mind when they go into those tracks?

A. Well, repair tracks as a rule are locked with switches that the switchman can't open.

Q. So in addition to the fact that switching crews know that they are repair tracks, there are also locks to keep the switches from being opened and the men going in and moving cars [62] with repairmen working under them, which is not true of interchange tracks?

A. No; they just have the blue flag.

Q. So you will admit that insofar as locked switches are concerned, the hazard to the repairmen, if they make these repairs on the interchange tracks would be greater than if they were performed on the repair tracks?

A. No, I can't agree that there is much difference in the danger.

Mr. Ewing: I believe that is all, your Honor.

Mr. Tolbert: That is all. I would like to call Mr. Hynds and have him sworn.

Mr. Ewing: Counsel, will he testify any differently?

Mr. Tolbert: No, he will testify the same as Mr. Madison, but I did want to bring out some of the necessary movements to set the car out. If you will agree that he will testify in just the same way Mr. Madison did, it will save some time.

Mr. Ewing: I will stipulate he will testify the same as Mr. Madison on his whole testimony, and then you may add anything you want.

Mr. Tolbert: I want to ask him something that I really should have asked Mr. Madison.

A. A. HYNDS,

called by the Plaintiff, in rebuttal; sworn.

Direct Examination

Mr. Tolbert: Q. Mr. Hynds, what is your position with [63] the Interstate Commerce Commission?

A. Inspector of safety appliances.

Q. How long have you been such an inspector?

A. Twenty-two years.

Q. Have you had any railroad experience prior to that?

A. Yes; ten or twelve years as brakeman and conductor.

Q. And during your experience as a brakeman or conductor you have done a considerable amount of switching, have you not? A. Yes, sir.

Q. Now you were with Mr. Madison on these days when these cars were inspected on the Southern

(Testimony of A. A. Hynds.)

Pacific interchange and the Western Pacific interchange. From your experience as a safe appliance inspector in a good many yards and your experience as a brakeman and a conductor having done a considerable amount of switching, and having been in this particular yard and knowing the track layout, what would you have to say with reference to setting these four defective cars out, from the Southern Pacific interchange and three from the Western Pacific interchange, without taking them over to Mormon Yards?

A. From this point of the Southern Pacific interchange to Mormon Yards (indicating on diagram), the movements are made over the main track of the Santa Fe, over which this passenger trunk moves. When switch engines or transfer engines are occupying that track, they do that under the protection of orders or information supplied by their yardman or under Rule 93, the yard [64] limit rule, which protects them against second or inferior class trains. The first class trains' protection they have to have orders on or know that the first class trains are not in operation or have passed. So therefore they are assumed to have full authority to operate on the main line in either direction, otherwise protect themselves by flag, Rule 99. In making this movement from the interchange track (indicating on diagram)—

Q. You are speaking about the Southern Pacific interchange track?

A. That is out from the Southern Pacific inter-

(Testimony of A. A. Hynds.)

change track to the Mormon Yard they have access right on that piece of track. There is no interference with traffic, as far as that is concerned. This car of the first cause of action was some four or five cars in from the east end of the interchange.

Q. That would be the end nearest the switch?

A. That would be the end nearest the switch. All they had to do was pull their cut out—if it were necessary to get the towerman to move these switches, as testified—I don't know whether that was the case at that time or not—but all switches may be used for any trains having authority and necessity even though they are controlled by a towerman. They can get the information to the towerman and give the signal of what track they want and he can line up the switches through his tower mechanism. Pull these cars up to the main line, throw the bad-order cars into the interchange track, take up the first cut and [65] go on home. That is on the S. P.

Q. How about on the Western Pacific interchange?

A. On the Western Pacific interchange, on the fourth cause of action, the Pennsylvania car 503205, that car stood first out at the east end.

Q. Nearest the switch?

A. Nearest the switch. They shoved their cut from the Mormon Yard up to the lead track number 1 into the delivery track of the W. P. They went back to the switch, coupled onto Pennsylvania car 503205 and the rest of the cars which were to the

(Testimony of A. A. Hynds.)

west or south as they go around the curve, and pulled the entire cut to the Mormon Yard. All they had to do at that time to make the switch was to cut off the PRR car and throw it over on the delivery track on top of the cut that they shoved in, and there was room to do that, then they could make that movement to the Mormon Yard with the rest of the cut.

Q. With the good order cars?

A. That is it.

Mr. Tolbert: I believe that is all. You may ask him.

Cross Examination

Mr. Ewing: Q. You say you don't know whether or not that inter-crossing tower—what do you call that? A. Interlocking tower.

Q. —interlocking tower was there on this date or not? A. I didn't say that.

Q. What was it you said you didn't know? [66]

A. I knew the tower was there. I said I didn't know whether it was the practice then or is now for them to get the switch from the interlocking tower.

Q. I see. You heard Mr. Kingston's testimony that it was? You don't quarrel with his testimony about that?

A. No, I don't quarrel with his testimony about that, the only thing I take exception to—or mention is that he said it was impossible to switch between these two points because of the interlocking tower.

(Testimony of A. A. Hynds.)

Q. Let me ask you this: In order to make this movement, to shove this cut of cars clear up beyond the crossing tracks, the Western Pacific and the Southern Pacific, wouldn't it be necessary to get clearance from both railroads in order to make that switching movement?

A. I wouldn't say it would be necessary to shove them clear up beyond the crossing.

Q. You heard his testimony on that?

A. On that one item?

Q. Yes.

A. I would say—do you have a ruler available?

The Clerk: Here is a ruler.

(The witness measures on diagram.)

A. I would say no, it would not be necessary to shove across the Southern Pacific. That is somewhere in the neighborhood of four inches—four hundred feet. But it would be necessary to pull back across the W. P. main line, because he does that anyway. [67]

Q. He has to do that twice on a switching movement? A. Yes, he would.

Q. If he switched out one car, he would have to block out the Western Pacific main line twice?

A. That is true.

Q. Of course, his testimony was he would have to block the Southern Pacific main line too?

A. He would, if he had too many cars, but—

Q. Do you think that is a more practical way to make the switch than to simply move it to the Mormon Yards? A. It is safer, yes.

Q. You would first have to disconnect your non-defective car? A. No, sir. [68]

Q. You want to pull the whole cut out?

A. Yes.

Q. You want to pull the whole cut out and shove the whole cut back up the main line?

A. That is right.

Q. All right. How many cars were in there on that day? A. I don't know.

Q. You know how many cars back it was from this cut?

A. It was some five or six cars back.

Q. Give us your best estimate how many cars were in the cut. A. I don't know.

Q. Do you know how many cars that interchange track holds? A. No, sir.

(Testimony of A. A. Hynds.)

Q. It is safer to block those crossings twice than it is to pull it back to the Mormon Yards?

A. It is safer for the employees of the railroad.

Q. Don't employees get injured when you have blocks on crossings?

A. These crossings are protected by wig-wag signals.

Q. Tell me how it is safer to the employees of this railroad to pull that cut out and shove it clear back here across these main line tracks and come back in on the interchange track and hook onto the rest of the non-defective cars— A. No.

Q. That is what you have to do in order to do what you are talking about.

A. No, you have the switch backwards.

(Testimony of A. A. Hynds.)

Q. Can you give us an estimate?

A. No, sir.

Q. Would you say it holds as many as forty cars?

A. In this link in here (indicating on diagram) ?

Q. No, on that whole interchange.

A. I would say probably two hundred.

Q. But you have no recollection of how many cars were in that cut that day? A. No, sir.

Q. Well, if it held two hundred cars, and they pulled that whole cut of cars out on the main line and shoved it back here it would block not only the Southern Pacific but the Western Pacific main lines, would it not?

A. I said this whole link (indicating on diagram) might hold two hundred cars. That goes clear back to the Southern Pacific Depot. [69]

Q. At any rate, there were quite a few cars on that interchange that day?

A. There was some cars.

Q. You don't know how many? A. No.

Q. But you know this was five cars back. Now, in order to make the movement you speak of, you pull the whole cut onto the main line and shove the whole cut up the main line, and if it was three hundred or four hundred feet in length it would block both the Southern Pacific and Western Pacific, and then disconnect the defective car with the small cut, pull them back down the main line, throw the switch, shove the small cut with the defective car into the interchange, disconnect the defective

(Testimony of A. A. Hynds.)

car, come back on the main line with your small cut, shove back up the main line, hook onto the remainder of your cut and go back to the Mormon yard, is that right? A. That is true.

Q. Tell me how it would involve any more hazard to perform this movement that I will now give you than the one you have just testified about, namely, to have gone in there as was done in this instance and pull the entire cut down to the Mormon Yards, there disconnect and shove back into that interchange track the defective car?

A. When you take the cars down here at the Mormon Yard you take them in this yard (indicating), and in order for a man—we will say the cars are pulled in here (indicating) and set out on number 5 as they usually are. The cars are left there. They are not switched by the crew that is [70] cognizant of this defect.

Q. They have cars on them, don't they?

A. They do, yes.

Q. This did? A. Yes.

Q. Go ahead.

A. When anybody goes into that number 5 track to switch those cars, they get in there and they can't get the pin on this car.

Q. Go ahead.

A. And therefore it is necessary that they go under and around between here on the other car to get the pin.

Q. My question is is it necessary for these men to make any more movements or more hazardous

(Testimony of A. A. Hynds.)

movements to disconnect these cars in the Mormon Yards or to make the movements you testified should be made?

A. They make the same number of movements, but the men that are aware of the defects are working solely in connection with this movement, whereas in the other movement the second crew who returns the car is not.

Q. Aren't the men always aware of defects when they are inspected? A. No, sir.

Q. You are assuming that some other crew made this change. You don't know that, do you?

A. I know it from this—

Q. But do you know that from your own knowledge?

A. No. I assume it from the lapse of time.

Q. Mr. Hynds, are you quite sure that car was the 5th car back [71] in that cut?

A. I said 5th or 6th.

Q. Or could have been the 20th car?

A. It could have been.

Q. I have here, Mr. Hynds, a record of the line-up of those cars, which indicates that that car was the 20th car back in that cut.

A. It could have been. I said some five or six, my recollection—

Q. There was about 20—about 30 cars in that cut? A. Which would make it easier my way.

Q. Is that right? A. Yes, sure.

Mr. Tolbert: May I interrupt you? The car he

(Testimony of A. A. Hynds.)

is talking about coming beyond the Southern Pacific interchange is the Wabash car.

The Witness: That is the only one that came up beyond the Southern Pacific.

Mr. Ewing: There she is (indicating document). It is the 20th car in that cut.

Mr. Tolbert: Yes.

Mr. Ewing: That is all.

Redirect Examination

Mr. Tolbert: Q. Now, Mr. Hynds, I just want to ask you a question or two. Counsel has laid much stress on the fact that if you hauled this cut of cars out in order to set the bad-order car back in you would block these railroads. As a matter of fact, every time you cross a railroad you block it?

A. Of course. This particular crossing—on both the W. P. and [72] the S. P. when the Santa Fe goes across there the interlocking plant takes care of operations on the passing railroads.

Q. Then it would be the same on a switching movement, would it not?

A. Absolutely, yes. They put the signal up to block. They have to block the Southern Pacific north and south and they have to block the Western Pacific north and south of the Santa Fe main line, and they are blocked by signals and derails that are operated solely from the towers to facilitate the movements east and west.

Q. Now I don't think we asked you about this track leading up from the interchange track which is called "285 Joint Track, A. T. & S. P.", would

(Testimony of A. A. Hynds.)

there be any reason why those cars could not be shoved up there a sufficient distance to cut this car out? A. Not that I know of.

Mr. Tolbert: That is all.

Recross Examination

Mr. Ewing: Q. Could that have been full of other cars? A. It may have been.

Q. Was it? A. I haven't any record of it.

Mr. Ewing: That is all.

Mr. Tolbert: That is all we have in rebuttal, your Honor.

Mr. Ewing: We rest.

The Court: The Court will have you gentlemen submit the matter on briefs. [73]

(Discussion as to briefs.)

(The matter was ordered submitted on briefs thirty-thirty and ten.)

[Endorsed]: Filed Dec. 15, 1945. [74]

[Endorsed]: No. 11237. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. The Atchison, Topeka & Santa Fe Railway Company, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed January 22, 1946.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11237

UNITED STATES OF AMERICA,

Appellant,

vs.

ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY COMPANY,

Appellee.

DESIGNATION OF RECORD ON APPEAL
AND STATEMENT OF POINTS ON
WHICH APPELLANT INTENDS TO RELY

The Appellant designates for inclusion in the printed record on appeal the entire transcript from the District Court as certified and filed with this Court on January 22, 1946, and proposes on its appeal to rely upon the following points:

1. The District Court erred in holding that as to each of the cars involved in this action the "defendant * * * refused to accept said car in its defective condition." (Findings of Fact IV in each cause of action.)
2. The District Court erred in holding that the movement by the defendant of each of the defective cars was "incidental to and necessary in disconnecting it from the remaining nondefective cars and returning it" to the delivering carrier. (Findings of Fact VIII in each cause of action.)

3. The District Court erred in holding that the movement by the defendant of each of the defective cars "included only the minimum number of switching operations necessary to disconnect the said car from the remaining nondefective cars and to return it" to the delivering carrier. (Findings of Fact VIII on each cause of action.)

4. The court erred in holding that the movement of each of the defective cars by the defendant "was the most practical method of disconnecting said car from the nondefective cars and returning it" to the delivering carrier "which could have been adopted under operating conditions prevailing at said place on said date." (Findings of Fact IX on each cause of action.)

5. The court erred in holding "that the method adopted by defendant in disconnecting" each of the defective cars "from the nondefective cars with which it was delivered and returning it" to the delivering carrier "subjected its employees to no greater hazard than any other method of disconnecting said car and returning it would have subjected them." (Findings of Fact XII on each cause of action.)

6. The court erred in holding as to each of the defective cars "that any other method of disconnecting of said car from the nondefective cars and its return would have created additional hazards to employees operating trains on the main line of defendant company and to the general public using railroad crossings in the vicinity of the said inter-

change track." (Findings of Fact XII on each cause of action.)

7. The court erred in holding that the movement by the defendant of each of the cars involved in this action "after its refusal in interchange for the purpose of and incidental to disconnecting it from non-defective cars and returning it to the delivering carrier, as found by the court to be a fact, does not constitute a violation of the provisions of the United States Code, Title 45, Sections 1 to 16, inclusive." (Conclusions of Law I on each cause of action.)

8. The court erred in holding "that the method used by the defendant in disconnecting" each of the cars involved in this action, "from the other cars and returning it to the delivering carrier, as * * * found by the court to be the most practical under operating conditions prevailing and further found to be no more hazardous than any other method, was properly selected by defendant and was within its discretion to select over other possible methods." (Conclusions of Law II on each cause of action.)

9. The court erred in holding that "the defendant has not violated the provisions of United States Code, Title 45, Sections 1 to 16 inclusive" as to any of the cars involved in this action. (Conclusions of Law V on each cause of action.)

10. The court erred in holding that on each "cause of action defendant is entitled to judgment against plaintiff." (Conclusions of Law VI on each cause of action.)

11. The court erred in holding in effect that a carrier knowing cars to be defective before they come into its possession and while asserting refusals to accept them from delivering carriers, may move them approximately a mile and a half over its own lines and justify doing so on the ground that the hauling was only such as was necessary to disconnect them from other cars and redeliver them to the delivering carriers. (Findings of Fact III, IV, VI and VII and Conclusions of Law I, II, V and VI on each cause of action.)

UNITED STATES OF AMERICA

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[Endorsed]: Filed February 7, 1946. Paul P.
O'Brien, Clerk.